

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

3 VERSATA SOFTWARE, INC.,) Civil Docket No.
4 ET AL) 2:07-CV-00153-CE
5) May 10, 2011
6 VS.) 8:30 A.M.
7)
8 SAP AMERICA, INC., ET AL)

7 TRANSCRIPT OF JURY TRIAL
8 BEFORE THE HONORABLE CHAD EVERINGHAM
9 UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

(Jury out.)

LAW CLERK: All rise.

THE COURT: Please be seated.

After -- thank you, Mr. Bunt.

All right. We're on the record in Versata against SAP, outside the presence of the Jury.

What's the problem?

MR. MELSHEIMER: Thank you, Your Honor. Sorry to trouble the Court.

Just a -- an objection to one of the Bakewell demonstratives. So in his report he identifies and says that 16 -- 16 SAP customers responded affirmatively to his survey, and, therefore, 40 percent of the -- of the total.

And now he's -- he's aware that two of those yeses have come back with affidavits saying our yeses don't mean what you say they mean. So instead of just sort of having to eat that, he's -- he's recalculated his data to say that there were 20 affirmative responses, all right, instead of 16 and then he's created -- so he's taken -- he's taken Microsoft and Chevron out of this one here, this -- this top one. He's taken them out and created this new category of or, right, so instead of and, the front -- the top one's

1 and, the bottom one's or.

2 So we just think it's a new opinion. You
3 know, their response is, well, the data was in there,
4 he's just remanipulated the data. Boy, that's a -- you
5 could drive a truck through that if that's the rule. So
6 we would just ask that this not be allowed as a -- as a
7 new opinion.

8 THE COURT: So do you want him to give the
9 opinion that you demonstrated to be incorrect so you can
10 cross-examine with the affidavits that you've obtained
11 from people that shows it's incorrect?

12 MR. MELSHEIMER: Yes, sir.

13 THE COURT: Okay. I'm going to overrule
14 your objection.

15 MR. MELSHEIMER: You want me to
16 cross-examine him on his changed opinion?

17 THE COURT: I'm going to -- she pointed
18 out a -- you can cross-examine him on the fact that he
19 originally gave an opinion and that he's had to
20 alternate it, but I'm going to allow him to give that
21 opinion.

22 MR. MELSHEIMER: All right.

23 THE COURT: Okay.

24 LAW CLERK: All rise.

25 (Recess.)

1 (Jury in.)

2 LAW CLERK: All rise.

3 THE COURT: Please be seated.

4 Morning, ladies and gentlemen. Continuing
5 on this morning hearing more evidence in the Plaintiffs'
6 case-in-chief.

7 You may call your next witness.

8 MS. FITZGERALD: The Plaintiff calls
9 Mr. Christopher Smith.

10 THE COURT: Mr. Smith, come around. If
11 you'll stop somewhere on your way up and take the oath,
12 I'd appreciate it.

13 THE WITNESS: I took good notes yesterday.
14 (Witness sworn.)

15 MS. FITZGERALD: May it please the Court.

16 THE COURT: Counsel.

17 CHRISTOPHER SMITH, PLAINTIFFS' WITNESS, SWORN

18 DIRECT EXAMINATION

19 BY MS. FITZGERALD:

20 Q. Mr. Smith, good morning.

21 A. Good morning.

22 Q. Would you introduce yourself to the Jury?

23 A. My name is Chris Smith.

24 Q. Where do you live, Mr. Smith?

25 A. I live in Austin, Texas, with my wife and two

1 teenage children.

2 Q. Who do you work for?

3 A. I work for Trilogy.

4 Q. How long have you worked for Trilogy?

5 A. I've worked for Trilogy since 1996.

6 Q. I'd like to ask you about a few topics today
7 and most of them relate to testimony that we heard
8 yesterday.

9 First of all, yesterday you saw multiple
10 documents that were internal Trilogy documents that set
11 forth criticisms in Trilogy by its own employees. Do
12 you remember those?

13 A. I do, yes.

14 Q. Did seeing those documents surprise you?

15 A. Not at all.

16 Q. Why not?

17 A. Well, Trilogy has always had a culture where we
18 have advised our employees to give us all sorts of
19 feedback at all times. And so we solicit that feedback
20 as a way to learn about what's going on at the company.

21 That feedback usually ranges from things
22 like we heard yesterday in respect to market direction,
23 product strategy, customer issues, you know, even
24 integration, all the way to, you know, parking spaces,
25 the number of speed bumps that are placed in the parking

1 garage and the types of coffee we should have in our
2 kitchen. All that feedback is important to us because
3 we do believe that that helps make the company better.

4 Q. Okay. Moving on to the next topic I want to
5 cover --

6 MS. FITZGERALD: Mr. Diaz, can you put up
7 the customer charts that we looked at yesterday?

8 Q. (By Ms. Fitzgerald) -- do you remember this
9 chart, Mr. Smith, with the Pricer customers?

10 A. I do, yes.

11 Q. So I'd like to ask you some questions about the
12 customer -- a few of the customers that are in bold
13 lettering. First, just to remind all of us, what does
14 the bold lettering signify?

15 A. So those would be the customers that were
16 Pricer led.

17 Q. Okay. And Pricer led meant?

18 A. Pricer led would mean sales deals where Pricer
19 was the dominant product sold.

20 Q. Let's talk first about Raychem which is there
21 in 1997. Were you personally involved in the Raychem
22 deal?

23 A. I was, yes.

24 Q. And why did Raychem purchase Trilogy Software?

25 A. Raychem purchased Trilogy Software primarily

1 because they needed the flexibility that the software
2 could provide as well as the performance it could
3 provide to distribute to their channel.

4 Q. Was there a particular piece of software that
5 Raychem purchased Trilogy because of?

6 A. Absolutely. That would have been the Pricer
7 product.

8 Q. What percentage of the overall value of the
9 Raychem deal would you attribute to the Pricer product?

10 A. I would say a hundred percent.

11 Q. Let's turn now to SGI. Is -- is that a
12 shorthand for -- for something else?

13 A. It is, that would be Silicon Graphics.

14 Q. Were you involved in the Silicon Graphics deal?

15 A. I was, yes.

16 Q. Why did Silicon Graphics purchase software from
17 Trilogy?

18 A. Silicon Graphics had a very complex sales
19 channel, both direct sales force and distributors and
20 other channel partners and so they really needed the --
21 not only the flexibility of the Pricer application, but
22 they also needed the detach solution because they had
23 all these folks out in the field quoting at the point of
24 sale.

25 Q. Now, what percentage of the Silicon Graphics

1 deal would you attribute to the Pricer product?

2 A. That would have been a hundred percent as well.

3 Q. Norands, I see that that's another company
4 that's here in bold. Were you part of the Norand deal?

5 A. I was, yes.

6 Q. And why did Norand purchase Trilogy Software?

7 A. So Norand was actually similar to Silicon
8 Graphics. Again, they -- they make handheld computers
9 for route accounting and so their sales force and
10 systems engineers and distributors were out in the field
11 as well. They needed the flexibility to price based on
12 the contracts with their customers, as well as having
13 that detach solution so they could be remote in the
14 field.

15 Q. What percentage of the Norand deal in 1997
16 would you attribute to the Pricer product?

17 A. That deal would have been a hundred percent as
18 well.

19 Q. The next Pricer customer I'd like to ask you
20 about is VWR, they're in 1998. Were you involved in
21 that deal?

22 A. I was, yes.

23 Q. And why did VWR buy Pricer?

24 A. VWR specifically needed Pricer for the
25 flexibility. Mainly they have a lot of contracts and a

1 lot of complex products and so they needed that
2 flexibility. They also needed the performance that
3 Pricer could give them so they could quickly get that
4 price out to the end user.

5 Q. Same question for -- for this one, what
6 percentage of the deal would you attribute to the Pricer
7 product?

8 A. A hundred percent.

9 Q. The last customer I want to ask you about is
10 Bay Networks, which also shows up in 1998. Were you
11 part of the Bay Networks deal?

12 A. I was. That's also Nortel Networks.

13 Q. And why did Bay Networks or Nortel Networks
14 purchase Pricer?

15 A. They had a very broad distribution channel, so
16 they needed the flexibility of Pricer as well as the
17 performance that could give and deliver those prices to
18 the channel.

19 Q. And same question, what percentage of that deal
20 would you attribute to the Pricer product?

21 A. That was a hundred percent Pricer sale.

22 Q. Now, you've been talking about flexibility and
23 performance and disconnected, are those the same
24 qualities that Mr. Carter was referring to yesterday
25 while he was describing his patented invention?

1 A. Yes, they would be.

2 Q. Okay. Let's move to another topic.

3 MS. FITZGERALD: Mr. Diaz, will you please
4 pull up Plaintiffs' Exhibit 338?

5 Q. (BY MS. FITZGERALD) I apologize, this is a bit
6 of a small spreadsheet, you'll have to squint?

7 A. Well, that's why I brought my glasses.

8 Q. Okay. Do you recognize this document?

9 A. I do.

10 Q. What is it?

11 A. So this document is created off our audited
12 financials. It shows our top 10 customers and their
13 profitability. Trilogy keeps track of the revenue
14 expenses for major accounts and so this -- this
15 basically shows the -- the profitability the margin
16 probability of our top 10.

17 Q. When you say top 10 customers, is that the top
18 10 of every customer of Trilogy or a certain subset?

19 A. No, no, it -- this is just the top 10 customers
20 that also have Pricer, not necessarily Pricer led but
21 Pricer as a component of it.

22 Q. What years does this chart cover?

23 A. So this would cover approximately a 12-year
24 period between FY '96 through FY '08.

25 Q. Is FY a fiscal year?

1 A. It would be a fiscal year, yes.

2 Q. I want to focus your attention on the row
3 that's labeled services margin, it's about a third of
4 the way down; do you see that?

5 A. I do.

6 Q. First of all, what is services margin?

7 A. So the services margin would essentially be the
8 profit margin calculated off our consulting business.

9 Q. And if you look all the way to the -- the other
10 end of the sheet, you see a column called total and for
11 services margin it says 67 percent. What does that 67
12 percent represent?

13 A. So that 67 percent would represent the average
14 of those 12 years for our profit margin on our
15 consulting services.

16 Q. Next I want to you to skip a couple rows down
17 to where it says direct margin percentage. Do you see
18 that, it's --

19 A. I do.

20 Q. Why don't you tell the Jury what direct margin
21 percentage means?

22 A. So the direct margin percentage would be our
23 profit margin that we made off of just our license and
24 our maintenance.

25 Q. Now, if you go all the way to the total column

1 for direct margin percentage, you see 72 percent. What
2 does that number stand for?

3 A. So that 72 percent would be the average for
4 that 12-year period for our profit margin on our license
5 and maintenance.

6 Q. Now, let's say that Trilogy had sold to
7 additional large companies beyond the large companies
8 that were listed in the chart that we just looked at.
9 Would these -- would this 67 percent service margin and
10 72 percent direct margin have stayed the same?

11 A. Oh, absolutely.

12 Q. And why is that?

13 A. Because we -- we focus our business on making
14 sure that we can hit these numbers with our Fortune 500
15 customers, that's our business model.

16 Q. Do these profit margins take into account
17 relevant sales and administrative expenses?

18 A. They do, yes.

19 Q. What about research and development or R&D
20 costs, are they accounted for in these profit margins?

21 A. They are, yes.

22 Q. Aside from the types of costs that are used to
23 calculate the company's profit margins that are here in
24 this chart, would Trilogy have incurred any other costs
25 had it gone out and sold Pricer to additional large

1 Fortune 500-type companies?

2 A. No, we would not.

3 Q. Are these profit margins of 67 percent for
4 services and 72 percent for license and maintenance
5 typical in the software industry?

6 A. Well, they would be typical for the software
7 industry for companies that focus on selling to the
8 Fortune 500. We would expect to see that to be similar.

9 Q. All right. I think we can take down this
10 chart. And I have just one more topic to talk to you
11 about. Let's switch gears and talk a little bit about
12 other software companies out in the market.

13 Now, as the Chief Operating Officer of
14 Trilogy, are you familiar with the market that Trilogy
15 is selling its pricing software in?

16 A. I am, yes.

17 Q. Have you been familiar with that market
18 throughout your time at Trilogy?

19 A. Yes, I have.

20 Q. Now, yesterday we heard Mr. Carter testify
21 regarding a number of companies other than Trilogy and
22 SAP who sell software; do you remember that?

23 A. I do.

24 Q. Since Mr. Carter left Trilogy in 2006, I want
25 to ask you questions about those same companies, but I

1 want to focus on 2006 to the present since you've still
2 been at the company. We heard Mr. Carter testify first
3 about a number of companies he called ERP vendors and
4 they were Oracle, PeopleSoft, JD Edwards, Baan, and
5 Siebel. Would agree with Mr. Carter that those
6 companies are ERP vendors?

7 A. I would, yes, they are.

8 Q. And what is ERP vendor?

9 A. That would be a broader solution for enterprise
10 resource planing.

11 Q. At any time since 2006, have any of the ERP
12 vendors that I just listed offered pricing software that
13 would meet the needs of a large SAP customer?

14 A. No, it's our opinion that -- that other ERP
15 providers would -- would not license a -- a small
16 component of their overall solution like pricing to a
17 competitor like SAP. They'd -- they'd rather just sell
18 their whole enterprise package as opposed to doing that.
19 And so by that definition alone, independent of whether
20 or not they could or not, it wouldn't -- it wouldn't be
21 feasible.

22 Q. Let's next discuss a company called i2. At any
23 time since 2006, has i2 offered pricing software that
24 would meet the pricing need of SAP's large customers?

25 A. No, they would not. They're more of a demand

1 planning type application.

2 Q. And what do you mean by that?

3 A. Well, any -- any -- any pricing that they would
4 actually have as part of their solution, we would
5 consider it to be a lower level because they -- they
6 mainly focus on individual parts, not necessarily the
7 complexity of the parts together.

8 Q. The next company is Click Commerce. At any
9 time since 2006, has Click Commerce offered pricing
10 software that would meet the needs of a large SAP
11 customer? And by needs, I mean pricing needs.

12 A. Sure. Click -- Click Commerce is actually more
13 of an auction-based pricing company and so they -- they
14 set an initial price, but then the price changes based
15 on bids and so it's not so much pricing execution as it
16 is just helping you set that base price.

17 Q. Okay. What about Comergent same question. In
18 the -- since 2006 to the present, have they offered any
19 pricing software that could satisfy the pricing needs of
20 one of these large Fortune 500 customers of SAP?

21 A. Not that we're aware of. We've not seen them
22 in any of our SAP accounts.

23 Q. If they offered that type of software, would
24 you expect to see them in an account?

25 A. Oh, absolutely.

1 Q. Chrome is the next one, I'm getting towards the
2 end of the list, but at any time since 2006, has Chrome
3 offered pricing software that would meet those pricing
4 needs for a large Fortune 500-type customer?

5 A. No. As Mr. Carter noted yesterday, Chrome is
6 more of a supplier of pricing data for the automotive
7 industry, not so much a company that provides pricing
8 functionality, so to speak.

9 Q. Now, I'll collapse the last two into one
10 question. Blue Martini, which was the company with the
11 funny name, and Salesforce.com, since 2006 have either
12 of those companies offered pricing software that would
13 meet those complex pricing needs of one of SAP's large
14 customers?

15 A. No. No, in the case of Blue Martini, they're
16 more of an application that sits on top of an ERP system
17 to provide website functionality. They -- they have
18 some low-level pricing functionality, but nothing that
19 we would consider to be a replacement of some of our
20 technology.

21 The sales force, I think was the second
22 one you noted, to the best of our knowledge, they don't
23 actually have any pricing components of their own,
24 they're more of a -- a portal or a place where customers
25 go to buy other people's applications to use within

1 sales force application.

2 Q. We also heard about two other companies
3 yesterday, I believe on one of the cross-examinations,
4 and they were companies named Firepond and Cybrant.
5 Going all the way back to 2003 when the patent issued,
6 have either of those companies offered pricing software
7 that could meet the pricing needs of a large Fortune 500
8 SAP company?

9 A. No, they have not. Again, we -- we've never
10 seen them in either, either of them in any of our SAP
11 accounts.

12 Q. Are you aware of any company, SAP and Trilogy
13 aside, any other software company out there in the
14 market who offers pricing software that would meet the
15 pricing needs of a large Fortune 500 SAP company or
16 customer?

17 A. We've not seen any to date.

18 Q. A couple of last questions. Yesterday we heard
19 a little bit about the bolt-on or bolt-on software; do
20 you recall that testimony?

21 A. I do.

22 Q. What is bolt-on software?

23 A. So bolt-on software would be, you know, any
24 kind of application or software package that can be used
25 in connection with another application or software

1 package such as SAP. Those two applications would be
2 linked together through some kind of integration.

3 Q. Now, when you started with Trilogy back in
4 1996, was there a market for software that could bolt on
5 to SAP pricing software specifically?

6 A. Oh, absolutely.

7 Q. Does that market still exist today?

8 A. Sure does.

9 Q. Has it existed throughout your entire time at
10 Trilogy?

11 A. Yes, it has.

12 MS. FITZGERALD: I'll pass the witness.

13 THE COURT: Cross-examination.

14 MR. MELSHEIMER: May it please the Court,
15 Your Honor.

16 CROSS-EXAMINATION

17 BY MR. MELSHEIMER:

18 Q. Good morning, Mr. Smith.

19 A. Good morning.

20 Q. We've not met. Let's start with some things
21 that I think you and I can agree on. You started out
22 your testimony talking about Trilogy being a very open
23 company that welcomed internal criticism; is that fair?

24 A. That's correct.

25 Q. Now, and you mentioned a couple of examples of

1 criticism of what the coffee was, criticism of how the
2 parking lot was set up; do you remember that?

3 A. I do. It's also important feed back.

4 Q. And that wasn't the kind of criticism we were
5 talking about yesterday, was it, sir?

6 A. There was a lot of criticism yesterday.

7 Q. Sir, we weren't talking yesterday about
8 criticism about the coffee or the parking lot, fair?

9 A. In the sections that she displayed yesterday, I
10 don't recall seeing that, no.

11 Q. Right. The criticisms that we talked about
12 yesterday, some of them related to the quality of
13 Trilogy Software, fair?

14 A. Sure.

15 Q. Some of the criticisms related to failures of
16 Trilogy to understand how SAP software worked, fair?

17 A. That's what we heard.

18 Q. Some of the criticisms related to Trilogy
19 being -- that the Pricer product was priced too high;
20 right?

21 A. No, we didn't hear that. Yes.

22 Q. Okay. And some of the criticisms related to
23 not satisfying customer expectations in the marketplace?

24 A. Yes.

25 Q. We can agree, sir, that all those types of

1 issues are more important to the success of a company
2 than what kind of coffee they have, fair statement?

3 A. I think they're all related, to be quite
4 honest, but yes, there's definitely a priority of -- of
5 issues and how you address them.

6 Q. Okay. So you think that all those issues that
7 I just listed out are related to coffee?

8 A. I think that you need to address all concerns
9 of employees, not just so that you can be a great
10 company for your customers, but you've also got to build
11 that great company of people that want to be there, that
12 want to help you succeed in making your customer
13 successful, right. If you don't have great people,
14 you're not going to have a great company. All right.
15 So --

16 Q. Mr. Smith --

17 A. -- you know --

18 Q. -- I'm sorry.

19 A. -- you stack rank them certainly, but I don't
20 throw them away.

21 Q. Did you understand my question?

22 A. Maybe you should ask it to me one more time.

23 Q. Okay. You're not saying that coffee is on the
24 same level of software being bad, software being priced
25 too high, customers being unhappy and the other kinds of

1 criticisms we talked about with Mr. Carter yesterday,
2 fair statement?

3 A. I wouldn't prioritize them ahead of that, no.

4 Q. Now, in fact, you understand that the reason
5 why we're here or certainly an important reason why
6 we're here is to determine what's reasonable for damages
7 in this case, right?

8 A. I do.

9 Q. And you've actually been here throughout the --
10 the whole trial, haven't you, sir?

11 A. I have, yes.

12 Q. You understand that Trilogy is not entitled to
13 lost profits if the reason for their decline in business
14 is related to, for example, their own internal problems,
15 fair?

16 A. That would be fair.

17 Q. You understand that Trilogy's not entitled to
18 lost profits if the reason why the sales went down was
19 because customers in '99 and 2000 and following didn't
20 see the same need for the software that they may have
21 seen earlier, fair?

22 A. That would be fair.

23 Q. You understand that Trilogy is not entitled to
24 lost profits if customers didn't buy the software in '99
25 and 2000 and 2001 because it was too expensive, if that

1 were true?

2 A. If that were true, sure.

3 Q. Right. If the evidence shows that one of the
4 factors that was causing Trilogy Software to not be
5 purchased in 2000 and 2001 and following years, was --
6 and 2003 and following, was because the price was too
7 high, that's not something that SAP's responsible for,
8 right?

9 A. That would be correct. You have to deliver
10 value for that price.

11 Q. Now, we've seen this chart of the sales going
12 up and then their sales going down, right, you've seen
13 that?

14 A. I have, yes.

15 Q. All right. Now, isn't it true, sir, that the
16 decline in revenue of Pricer had actually been predicted
17 at Trilogy back in 1997?

18 A. I don't know if I'd agree with that.

19 Q. All right.

20 MR. MELSHEIMER: Well let's take a look at
21 the -- the projection of revenue by product category.

22 Q. (By Mr. Melsheimer) Yes, sir. Now, this was a
23 document that we looked at with Mr. Carter, and this
24 shows --

25 MR. MELSHEIMER: -- first of all, if we go

1 to the first page.

2 Q. (By Mr. Melsheimer) This is a slide deck that
3 Mr. Carter -- excuse me, that Mr. Nath prepared in
4 January of 1998, right?

5 A. That's what it says, yes.

6 Q. Right. And if we go back to the chart, what
7 we've got is starting in -- and can we agree, sir,
8 that -- that the Pricer sales, that this is Pricer,
9 these right here; can you see that?

10 A. I can see that, yes.

11 Q. Okay. And as a percentage, revenue percentage
12 by product, it's declining from '97 to '98 to '99, at
13 least that's what this chart shows, correct?

14 A. It shows it declining as a revenue
15 percentage --

16 Q. As a --

17 A. -- by product.

18 Q. -- percentage by product, that's what it says,
19 right?

20 A. Correct.

21 Q. And this was a projection made in the first
22 part of 1998, fair?

23 A. I believe that to be true.

24 Q. Now, in 1999, you saw the e-mail from
25 Mr. Thompson --

1 MR. MELSHEIMER: Can we pull that up,
2 Mr. Barnes? 9 -- 957.

3 Q. (By Mr. Melsheimer) In 1999, we saw the --

4 MR. MELSHEIMER: The next page.

5 Q. (By Mr. Melsheimer) -- we saw Exhibit 957, this
6 e-mail from one of the developers, Mr. -- Mr. Thompson,
7 who concluded that the Trilogy Software is bad, right?

8 A. Well, I think that whole thread there shows
9 a --

10 Q. Did you --

11 A. -- lot of things.

12 Q. -- understand my question?

13 A. I do.

14 Q. Okay. I'm sorry. And they're going to get to
15 ask you questions --

16 A. Sure.

17 Q. -- but my question is: He concluded that the
18 Trilogy Software was bad, fair statement?

19 A. That was his opinion, yes.

20 Q. Okay. Well, he didn't just say it was his
21 opinion in this e-mail, fair?

22 A. I haven't read the whole e-mail.

23 Q. Well, he said: You can ask any integrator.
24 Now, tell us who -- who an integrator is.

25 A. I assume that would be anyone from our

1 consulting group on to third-party people that would
2 deploy our software.

3 Q. Integrators are people outside of Trilogy that
4 help install the software at customer sites, fair?

5 A. Correct.

6 Q. He says: Ask any user, right?

7 A. That's what it says.

8 Q. A user of the software would be a customer of
9 Trilogy, right?

10 A. That's what it says.

11 Q. And then he says: Ask any customer. Is there
12 a difference between a customer and a user?

13 A. I wouldn't think so.

14 Q. All right. And then finally he says: We
15 currently have no referenceable customers in indirect
16 and selling chain. Now, let's just be clear. Pricer is
17 part of selling chain, that's what Mr. Carter told us,
18 right?

19 A. I believe that's what he said yesterday, yes.

20 Q. And that's true?

21 A. Apparently he thought so.

22 Q. No, no. It's true that Pricer is part of a
23 selling chain?

24 A. Oh, I'm sorry, yes, that's true.

25 Q. Sorry.

1 A. Yeah.

2 Q. And he says: We have no referenceable
3 customers in indirect selling chain. Now, referenceable
4 is not a word that you hear a lot, but referenceable
5 customers means customers that you can send to to give a
6 reference for your product, right?

7 A. That's how I would define it, yes.

8 Q. And finally, if we move on to 2000 --

9 MR. MELSHEIMER: Let's go to Exhibit 860.

10 Q. (By Mr. Melsheimer) -- this is this customer
11 satisfaction survey that we looked at with Mr. Carter
12 that the company commissioned in 2000, September of
13 2000, correct?

14 A. That's correct.

15 Q. Now sir, understand, I'm not fussing at you for
16 commissioning this kind of survey, I actually think it's
17 a pretty good idea and I take it y'all did as well,
18 right?

19 A. We did do the study, so yes --

20 Q. To find --

21 A. -- we -- we like feedback.

22 Q. -- to find out what your customers think is
23 pretty important?

24 A. Absolutely.

25 Q. Because if your customers don't like your

1 product or your service, your business is going to start
2 up here and it's going to go down here, fair?

3 A. It's a possible outcome.

4 Q. And what this survey revealed, one of the
5 findings was is --

6 MR. MELSHEIMER: If we can go to Page 14.

7 Q. (By Mr. Melsheimer) -- is that 57.5 percent of
8 the people felt like that Trilogy's -- had fallen short
9 of the expectations set of the software, fair?

10 A. For all of the products in our portfolio, yes.

11 Q. If you have sales that are up here and you have
12 57 percent of your customers saying you're not meeting
13 my expectations, those sales may well end up down here,
14 fair?

15 A. They could.

16 Q. Now, let me take you to -- also sticking in
17 2000, let me take you to a board discussion, a board
18 meeting. The board of Trilogy met on a regular basis,
19 did it not?

20 A. I'm not sure what you mean by the board.

21 Q. Well, did Trilogy have a board of directors of
22 the company?

23 A. They did, yes.

24 Q. All right. Back in 2000?

25 A. I believe we still had a board then, yes.

1 Q. Those are the people charged at the highest
2 levels with overseeing the direction of the company and
3 its success or failure, fair?

4 A. That would be correct.

5 Q. Let's take a look at Exhibit 608. This is a
6 board discussion in April of 2000 reviewing some of the
7 financials and other general information about the
8 company, right?

9 A. That's what it appears to be, yes.

10 Q. All right. And it says, most significant
11 driver -- so it says: Trilogy Software bookings at 8
12 million for the quarter. Now, that's all the software
13 products of the company, right?

14 A. I'm not sure by this -- this section, but it
15 could be.

16 Q. Could be. I mean, I guess what I'm trying to
17 say is, I -- I mean, I'm not trying to say and I
18 don't -- I don't want you to say this if it's not true,
19 that -- that that's just Pricer.

20 A. I don't believe that would be just Pricer.

21 Q. And it says: Most significant drivers of the
22 shortfall are reduced marketing spend in the past year
23 and the lack of business development resources due to
24 severe attrition. Do you see that?

25 A. I do.

1 Q. Now, let me tell you what I think this is
2 saying. This is saying that your numbers for the first
3 quarter were 8 million and that was below what you
4 expected, right?

5 A. I don't know if I'd agree with that.

6 Q. Okay. Well, it says: Most significant drivers
7 of the shortfall. Doesn't that sound to you like that
8 \$8 million number was supposed to be higher or predicted
9 to be higher at one point, fair?

10 A. That's fair. We set our goals very high.

11 Q. Okay. So I -- I just -- again, I don't want to
12 put words in your mouth or say something that's not in
13 this document, but that's the way I read that document
14 and do you agree with me, sir, that that's a fair
15 reading?

16 A. I agree that it says that there was a
17 shortfall.

18 Q. And it says: The drivers of the shortfall are
19 not SAP, right?

20 A. It does not say that, no.

21 Q. It doesn't say the drivers of the shortfall are
22 some feature of SAP's product, right?

23 A. It doesn't, because that would be -- that's a
24 higher level summary here.

25 Q. I don't understand your answer, so I'm going to

1 ask you another question. You're not suggesting, are
2 you, that there's some summary connected with this that
3 puts this shortfall on SAP, are you?

4 A. No. What I'm saying is that whatever shortfall
5 is there, there are multiple business units included in
6 that number and they're each going to have their own
7 reason for why they may have hit or not hit their
8 numbers.

9 Q. Okay. So it says: The most significant
10 drivers for the shortfall are reduced marketing
11 spending, right?

12 A. That's what it says.

13 Q. And that means you weren't spending enough on
14 marketing, right? Strike that, that's a bad question.

15 That means that you reduced the spending
16 on marketing and this document's concluding that that
17 caused us to have a shortfall, fair?

18 A. That's what this says.

19 Q. All right. And the lack of business
20 development resources -- now, business development
21 resources is people out there to sell your product; do I
22 have that right.

23 A. It would actually be people that are hired to
24 help drive our business, they wouldn't be the physical
25 salespeople.

1 Q. People to develop business?

2 A. Correct.

3 Q. You didn't have enough of them because a bunch
4 of them had quit; isn't that what that says?

5 A. Attrition is always a problem in software
6 companies, especially during this era, that's -- that's
7 why we had the benefits that we had to have to keep high
8 caliber talent.

9 Q. Mr. Smith, just answer my question. Isn't it
10 true that attrition means you had people who were
11 quitting?

12 A. Correct.

13 Q. And it wasn't moderate attrition, it wasn't
14 modest attrition, it was severe attrition, right?

15 A. That's what it says.

16 Q. Okay.

17 A. I don't know what that means, but it says that.

18 Q. Well, are you saying that you don't know what
19 this Trilogy document means; is -- is that your
20 testimony?

21 A. I'm saying I don't know what the definition of
22 severe means --

23 Q. Okay.

24 A. -- whether that's one percent or ten percent.

25 Q. It doesn't sound good, does it?

1 A. Attrition is never good for software --

2 Q. Okay.

3 A. -- companies.

4 Q. So and then let me ask you about this, license
5 revenue -- well, strike that.

6 Let's go to attrition, I'm sorry.

7 Attrition in recent months has been better, however,
8 still a cause for close monitoring and concern. So you
9 were having -- you were losing people in -- in the time
10 period of 2000 and that was a -- that was a cause for
11 close monitoring and concern, right?

12 A. All software companies were losing people in
13 that era. We were all trying to keep a close eye on our
14 people.

15 Q. Okay. Mr. Smith, I -- if you would just focus
16 on answering my question. I'm not --

17 A. Sure.

18 Q. -- asking you about other software companies
19 because other software companies aren't in this court
20 seeking lost profits, Trilogy is, right?

21 A. I understand.

22 Q. And you understand that if the reason why
23 Trilogy couldn't make sales was because all their people
24 were quitting, that's not SAP's fault, fair statement?

25 A. I don't think it says all our people are

1 quitting, but it does say there was severe attrition.

2 Q. I appreciate that. The point is if the revenue
3 drop was due to people quitting, that's not SAP's
4 problem, is it, sir?

5 A. That would be correct.

6 Q. That was Trilogy's problem, a problem of which
7 they were well aware in 2000, right?

8 A. Correct.

9 Q. Now, the other issue, I just want to -- before
10 we leave this document, because we talked about a little
11 about with Mr. Carter, it's spending. Spending grew by
12 10 million dollars a quarter over quarter. So I read
13 that as meaning it's 10 million dollars more than the
14 last quarter. Is that the way you read it?

15 A. That's the way I would read it, yes.

16 Q. 10 million dollar quarter over quarter driven
17 primarily by increased recruiting costs, which is 3.9
18 million, almost \$4 million for recruiting people?

19 A. That's what it says.

20 Q. Are those the -- some of the things Mr. Carter
21 talked about, the fancy hotels and the trips to Las
22 Vegas and things of that nature?

23 A. I wouldn't know what all it included, but
24 it's -- I'm sure there's a lot of recruiters in there as
25 well.

1 Q. In your recruiting costs of four million were
2 actually not double but quite a bit more than the money
3 that -- quite a bit more than the money for marketing,
4 right?

5 A. Sure.

6 Q. And quite a bit more or -- and -- and the
7 amount you spent on marketing, 1.4 million, you've got
8 actually twice as much money allocated to stuff that's
9 just miscellaneous, right?

10 A. Well, we certainly knew what that was, but it's
11 categorized as that, yes.

12 Q. All right. All right, sir.

13 MR. MELSHEIMER: You -- you can take that
14 down, Mr. Barnes.

15 Q. (By Mr. Melsheimer) A few other things I think
16 we can agree on, sir, we agree that this Trilogy didn't
17 have this '350 patent back in 1998 or 1999 or 2000,
18 right?

19 A. That's correct.

20 Q. Patent didn't issue till 2003, right?

21 A. That's correct.

22 Q. All right. And you heard Mr. Dholakia
23 yesterday talk about the marketplace and the drop off in
24 the business, right?

25 A. I did, yes.

1 Q. He was talking about that happening in '98,
2 '99, and 2000, correct?

3 A. Correct.

4 Q. When there was no '350 patent, right?

5 A. Correct.

6 Q. Now, let's talk a little bit about this
7 hierarchical access feature.

8 Now, Trilogy -- part of Trilogy's business
9 was to keep track of what was happening in the
10 marketplace, fair statement?

11 A. We tried, yes.

12 Q. It's real important to know what all your
13 competitors are doing, what they're saying, the kind of
14 products they're offering, so you can be prepared to
15 compete, right?

16 A. That's correct.

17 Q. You have people at Trilogy who were devoted
18 solely to the task of gathering what's called
19 competitive intelligence; isn't that right?

20 A. We would have those people, yes.

21 Q. How many people at Trilogy did you have devoted
22 to gathering what's called competitive intelligence?

23 A. I don't know. I don't know if I could guess at
24 a number.

25 Q. I don't want you to guess. More than a

1 handful, you think?

2 A. More than a handful probably, yes.

3 Q. Okay. Because it's pretty important, isn't
4 it --

5 A. Certainly.

6 Q. -- to know what's out there? When we think of
7 intelligence as being something with the military or
8 something like that, but competitive intelligence is
9 basically finding out what is happening in the
10 marketplace in as much detail as you can possibly find,
11 right?

12 A. Correct, but you don't only get it from those
13 people.

14 Q. Right. You -- exactly. You get it from
15 third-party sources, correct?

16 A. We get it from our own people and our own
17 customers, too.

18 Q. You get it from customers that you're
19 interacting with, right?

20 A. Sure.

21 Q. You talk to customers and you say, well, I see
22 you're buying this product or that product, why'd you do
23 that? What was important to you? That sort of thing,
24 right?

25 A. Sometimes.

1 Q. Right. And you sometimes interview your own
2 customers to see what can we do better, what can we --
3 what kind of features can we add, right?

4 A. We always talk to our own customers about our
5 own product, yes.

6 Q. You would buy reports from companies like the
7 Gartner Group and other consultants to find out what was
8 going on in the software business, right?

9 A. Which would tell us their view of the world,
10 yes.

11 Q. And that along with all the other information
12 you would gather is part of this competitive
13 intelligence-type data that you would use -- that
14 Trilogy would use to help run their business, fair?

15 A. Well, it -- I don't know how much it would
16 actually run the business versus help us with our
17 product strategy.

18 Q. Well, with respect to this hierarchy access
19 feature, in spite of all that work that you did, it's
20 your testimony that Trilogy did, it's your testimony
21 that Trilogy never heard of hierarchical access, that
22 capability, that small feature, that Trilogy never heard
23 about it until after this lawsuit was filed, right?

24 A. That's correct.

25 Q. So this -- this feature that had been put into

1 SAP software, which you're now saying a piece of it, a
2 small capability of it, took your company from up to the
3 highest heights to the lowest lows and you didn't even
4 know about it until after the lawsuit was filed, right?

5 A. That's correct.

6 Q. When SAP released the hierarchy access feature
7 along with dozens of other updates, it notified its
8 customers, did it not? You know that, right?

9 A. That SAP notified its customers?

10 Q. Right.

11 A. I imagine they did.

12 Q. Right. Because certainly Trilogy, when it
13 makes changes in the software, adds features, different
14 capabilities, you'll send out some sort of release note
15 or memo that says, hey, there's 15 or 20 things that
16 we've added or changed, right?

17 A. We would have that in release notes, yes.

18 Q. And your customers get that?

19 A. Our maintenance paying customers would get --

20 Q. Right.

21 A. -- that, yes.

22 Q. Okay. And you would expect that SAP's
23 customers to have gotten that as well?

24 A. I'm not sure. I don't know how SAP
25 communicates to their customers.

1 Q. Now, with respect to this hierarchical access
2 capability, do I have it right, sir, that you're not
3 aware of any potential customer telling Trilogy that we
4 did not pick your software because we're going to choose
5 SAP's instead because of hierarchy access, right?

6 A. Typically, when you lose sales deals, you don't
7 get notified to that low level detail of why you lost,
8 so that would be correct.

9 Q. So no customer ever told you we're thinking
10 about going with Versata or Trilogy, but we decided to
11 go with SAP because we really like this hierarchy access
12 feature that's one of hundreds of features within their
13 pricing suite, no one ever told you that?

14 A. Yeah, I don't know why they would.

15 THE COURT: Well, if you can answer his
16 question with a yes or no, please, do so, okay?

17 A. No, they never did.

18 Q. (By Mr. Melsheimer) They never did. You know
19 that's kind of an important question, right, sir?

20 A. I understand that certain parties believe
21 that's --

22 Q. Well --

23 A. -- an important question, yes.

24 Q. -- sir, that's one of the reasons that we're
25 here taking four days, is in part to try to figure out

1 whether or not that little feature is what caused your
2 business to go to the bottom, that's what we're here to
3 talk about, right?

4 A. I understand.

5 Q. Okay. Now, let's talk about -- okay. You said
6 a minute ago that -- before the Judge's comment, you
7 said a minute ago that you don't -- you don't know, you
8 don't -- customers don't tell you why they're not doing
9 things, you don't know why you don't get sales; is that
10 what you said?

11 A. That's what I said, yes.

12 Q. Right. That's not entirely true, is it, sir,
13 to be fair?

14 A. What do you mean?

15 Q. Well, you're overstating it, aren't you?

16 A. I don't understand.

17 Q. All right. Well, in fact, the Jury, we've seen
18 documents that show that, in fact, Trilogy did know, did
19 know reasons why they weren't getting sales or why they
20 were losing customers; isn't that right, sir?

21 A. I mean, we -- we certainly have a lot of
22 documents that are trying to figure out why we're losing
23 sales, yes.

24 MR. MELSHEIMER: Well let's take a look at
25 824.

1 Q. (By Mr. Melsheimer) Now, if there's anybody
2 that knows anything about Trilogy in 1998, it's one Joe
3 Liemandt, right?

4 A. That would be correct.

5 Q. Founder of the company?

6 A. Yes, sir.

7 Q. Smart guy?

8 A. Yep.

9 Q. Spent basically 24/7 working at this company
10 during this time period, right?

11 A. That's correct.

12 Q. And he was very knowledgeable about what was
13 happening in the marketplace with Trilogy's customers
14 back in April of 1998, right?

15 A. Yes.

16 Q. April of '98 is months before SAP introduced
17 this small hierarchy access feature to its pricing
18 component of its ERP software, right, months?

19 A. Yes.

20 Q. And Mr. Liemandt tells us or tells the folks at
21 Trilogy that -- a couple things, the Lucent \$15 million
22 deal, our arrogance and incompetence caused us to lose
23 this, right?

24 A. That's what it says.

25 Q. That's a reason for why they lost -- why you

1 lost the Lucent business because, again, I'm not saying
2 this, but this is what the head man says, said we were
3 arrogant and incompetent, right?

4 A. That's what it says.

5 Q. And then it says with respect to Pricer, that
6 the reason why you weren't getting Pricer sales was
7 because it was a poor value, poor value proposition into
8 SAP accounts, right?

9 A. That's what it says.

10 Q. Well, and when you say that's what it says,
11 you're not trying to tell the Jury you're disagreeing
12 with us, right?

13 A. No, that's what Joe said.

14 Q. And you agree with it?

15 A. I don't know if I necessarily agree with it,
16 but Joe did say it.

17 Q. So -- okay. Poor value proposition, SAP
18 accounts, I believe Mr. Carter agreed with me that poor
19 value proposition means wasn't a good deal, right?
20 Wasn't perceived as a good deal by those customers?

21 A. Or we weren't -- be able to convince them of
22 that, yes.

23 Q. And that it was too maintenance technical, not
24 enough business benefits. I think Mr. Carter told us
25 that, again, there were some -- maybe some technical

1 issues with the software, maintenance was complicated,
2 but in any event, there were not enough business
3 benefits, right?

4 A. Apparently that's what this says for whatever
5 customers we were trying to sell in that quarter, yes.

6 Q. And we can agree that back in April of 1998
7 there's no way to pin any of this on anything SAP did,
8 fair?

9 A. I don't know how to answer that.

10 Q. Okay. Well, there's no suggestion by
11 Mr. Liemandt in this exhibit, sir, that any of the
12 problems they're having with Pricer back in 1998, in
13 April, months before -- months before the hierarchy
14 access feature was introduced, there's no suggestion
15 that any of this has anything to do with SAP, fair?

16 A. I don't see anything in that e-mail, no.

17 Q. So at least with respect to Mr. Liemandt, the
18 head of the company, he did seem to have a pretty good
19 idea at least as to some customers as to why they
20 weren't buying Pricer, right?

21 A. He seemed to, yes.

22 Q. But he's not the only one, is he, sir?

23 A. The only one, what?

24 Q. He's not the only one that had a sense of why
25 people weren't buying Pricer?

1 MR. MELSHEIMER: Can we pull the Snyder
2 e-mail?

3 Q. (By Mr. Melsheimer) Scott Snyder was -- he's a
4 pretty important technical guy at Trilogy?

5 A. He led our development organization, yes.

6 Q. So a very smart software guy?

7 A. I would suppose so.

8 Q. Right. You're not a software guy, are you?

9 A. No, I'm not anymore.

10 Q. I'm not either. Okay.

11 MR. MELSHEIMER: So do we have the --
12 Mr. Barnes, do we have that one?

13 VIDEO TECH: Do you have the exhibit
14 number?

15 MR. MELSHEIMER: It's easy if you have the
16 numbers.

17 Q. (By Mr. Melsheimer) So Mr. Snyder, this is in
18 December of 1998, and this is talking about, again,
19 accounts that we've lost due to SAP integration issues,
20 right?

21 A. That's what it says.

22 Q. And there we're talking about the ability for
23 the Pricer product to bolt on or interface with the SAP
24 product, right?

25 A. I agree.

1 Q. Certainly the folks at Trilogy accepted
2 responsibility that if you're going to try to sell a
3 product that's going to go with someone else's product,
4 it's -- the company that's selling that smaller product,
5 to make sure that it interfaces, right?

6 A. I'm sorry. I don't understand the question.

7 Q. Well, I'm sorry. Maybe that was complicated.

8 But I guess my point is, is that SAP
9 integration issues -- if you're selling to SAP customers
10 or you're selling to Oracle customers, right, you've got
11 to make sure that your product will work with their
12 bigger product. You've got a little bitty product, and
13 you've got to make sure your product works with their
14 big product, fair?

15 A. That's fair.

16 Q. And that's what this SAP integration issue is,
17 is you were having problems getting the product to fit
18 with SAP back in December of 1998?

19 A. That's what Scott's saying.

20 Q. And that's the reason why you lost some
21 accounts, right, according to Mr. Snyder?

22 A. According to Mr. Snyder.

23 Q. Now I want to talk to you a little bit about
24 the market for SAP for -- for -- excuse me -- I want to
25 talk to you a little bit about the market that you had

1 for your products.

2 I think you -- you told us that -- and
3 you've heard this testimony that -- that your product
4 was kind of a bolt-on -- we just talked about that --
5 kind of a bolt-on to SAP's bigger product, right?

6 A. That's fair.

7 Q. Now, your -- your market, though, your
8 potential market, though, was beyond simply SAP
9 customers, right?

10 A. What do you mean?

11 Q. Well, you sold to lots of different companies,
12 including some companies that did not use SAP, fair?

13 A. We targeted the Fortune 500, yes.

14 Q. And the Fortune 500 is not all SAP, right?

15 A. They're dominantly SAP.

16 Q. Well, but let's talk about that for a second.
17 Just do some quick math.

18 Fortune 500, how many -- what percentage
19 is SAP, if you know?

20 A. In what time period?

21 Q. Well, let's talk about this time period, the
22 time period of '98, '99, 2000, 2001.

23 A. Sure.

24 Q. Do you know?

25 A. Well, what I would say is, they're dominantly

1 an ERP vendor who was making a lot of money off the Y2K
2 coming up, and you have Oracle, who is an up and coming
3 player, and so they weren't quite there with their ERP
4 offering, so I would say SAP was significant. Probably
5 over 50 percent.

6 Q. Okay. Over 50 percent?

7 A. I think that's fair.

8 Q. Okay. Sure.

9 A. It's probably higher, but that's a conservative
10 good number.

11 Q. Can we say -- just for the purposes of our
12 little discussion here, let's say 60, just for argument
13 purposes. Would that be fair? 55?

14 A. Whatever you'd like to say.

15 Q. Okay. Let's just take 60, because really my
16 point is pretty simple. Even were it as high as 60 --
17 and we're not saying it is, but even were it as high as
18 60 in the Fortune 500, that still leaves several hundred
19 companies that are not SAP.

20 Do I have the math about right?

21 A. It could be, yes.

22 Q. You talked about Silicon Graphics in your
23 testimony with Ms. Fitzgerald, right?

24 A. That's correct.

25 Q. And Silicon Graphics, you said was a deal that

1 they purchased it because of Pricer, right?

2 A. That's correct.

3 Q. Silicon Graphics is an Oracle customer; isn't
4 that right, sir?

5 A. I believe they were at the time, yes.

6 Q. So they weren't an SAP customer when you sold
7 them Pricer; they were a customer of Oracle, right?

8 A. That -- I believe so, yes.

9 Q. All right. Sun is a company that you sold
10 Pricer to, right?

11 A. That's correct.

12 Q. And Sun is an Oracle customer, right?

13 A. Well, they're owned by Oracle now, so yes.

14 Q. Well, that's now, but we're not talking about
15 at this moment, sir. I'm talking about, when you sold
16 it to them, you knew that Sun ran Oracle when you sold
17 it to them, right?

18 A. Absolutely.

19 Q. Okay. They've since been purchased.

20 A. They have, yes.

21 Q. Right. NCR is a company that was on your chart
22 that you sold Pricer to, right?

23 A. They were.

24 Q. NCR runs Oracle, doesn't it, sir?

25 A. They very well might. I don't recall.

1 Q. And the Fortune 500 doesn't include the
2 thousands and thousands of midsized to smaller companies
3 that Mr. Carter testified they were also trying to sell
4 Pricer to, fair?

5 A. Well, that's fair, yes.

6 MR. MELSHEIMER: May I have just a moment,
7 Your Honor?

8 THE COURT: Yes.

9 (Pause.)

10 Q. (By Mr. Melsheimer) Going back to the
11 integration issues, that some people had difficulty
12 making your Pricer software work with either their
13 Oracle software or their SAP software, do you remember
14 that testimony, sir?

15 A. Do I remember the testimony from when?

16 Q. Well, do you remember that issue, that being an
17 issue back in '98, '99, 2000?

18 A. Integration issues are always part of
19 enterprise software, but yes.

20 Q. And that was certainly an issue at Trilogy,
21 right?

22 A. Yes.

23 Q. Specifically with respect to Pricer, right?

24 A. Not exclusive to Pricer, but yes.

25 Q. Okay. And one thing I've been meaning to ask,

1 so when Trilogy installed Pricer at Trilogy, did you
2 have those same kind of technical issues?

3 A. Well, what do you mean? When we install our
4 own product in our own location?

5 Q. When you used Pricer to run Trilogy's pricing,
6 did you have trouble making it work?

7 A. I don't understand the question.

8 Q. Well, maybe ask it this way: You didn't use
9 Pricer at Trilogy, did you?

10 A. Did we use our own products on a day-to-day
11 basis?

12 Q. That's not my question.

13 A. Okay.

14 Q. Did you use Pricer to do pricing at Trilogy?

15 A. No, we didn't.

16 Q. So you never had to worry about the technical
17 issues of, quote, installing it because you didn't use
18 Pricer at Trilogy to do your pricing, fair?

19 A. I don't think I agree with that at all.

20 Q. You didn't use Pricer to do your pricing at
21 Trilogy. You agree with that, though.

22 A. Well, I do agree with that.

23 Q. We heard some testimony about BAPIs. BAPI is
24 kind of an interface between one software program and
25 another. Is that a rough approximation of it, sir?

1 A. It's my understanding.

2 Q. Now, Trilogy and SAP were competitors, right?

3 A. Yes.

4 Q. They competed very hard against each other?

5 A. In certain spaces.

6 Q. There's some information -- you heard
7 Mr. Carter talk about some information yesterday that
8 Trilogy shared with SAP, right?

9 A. I did.

10 Q. You heard Mr. Carter say that there's some
11 information that Trilogy kept secret from SAP, right?

12 A. I heard that, yes.

13 Q. And certainly there's nothing wrong with the
14 concept of not sharing information with a competitor,
15 right?

16 A. Certainly not.

17 Q. You said -- now, we heard some testimony
18 yesterday from Mr. Dholakia that SAP didn't create this
19 BAPI for Trilogy. You heard that?

20 A. I did hear that, yes.

21 Q. Do you have any idea of how expensive it would
22 be for SAP to create a BAPI just between SAP software
23 and Trilogy Software? Do you have any idea of cost
24 associated with that?

25 A. I do not.

1 Q. Do you have any idea of how much effort it
2 would require SAP to make that BAPI for Trilogy?

3 A. I don't. I wouldn't imagine it would take a
4 lot, because they've done it for others.

5 Q. But you don't know.

6 A. No, sir.

7 Q. Now, this patent, this '350 patent, is not a
8 patent on a BAPI, right?

9 A. Oh, no. No, it's not.

10 Q. It's not a patent that deals with the technical
11 interface between two software programs, right?

12 A. That's correct.

13 Q. Now, I heard Mr. Dholakia and I thought I heard
14 Mr. Carter say that the company sort of gave up trying
15 to sell Pricer in about 2000, 2001. Is that a fair
16 recollection?

17 A. What I recall I heard is that we stopped trying
18 to sell new customers Pricer, but we had lots of
19 customers still on Pricer that we invested in.

20 Q. So you didn't -- so starting around 2000 or
21 2001, you stopped selling it for new customers, but you
22 still supported your old customers; is that fair?

23 A. Yeah. I don't know if I agree we stopped
24 selling it. It's still for sale. But we didn't have a
25 large investment behind it, no.

1 Q. You weren't actively attempting to sell Pricer
2 from 2001 on to new customers, right?

3 A. Well, we actively try to sell Pricer even
4 today.

5 Q. So you would disagree with Mr. Carter or
6 Mr. Dholakia that you basically stopped the business for
7 new customers in about 2001?

8 A. I -- I would disagree with that. We stopped
9 the heavy investment in the marketing of it, but the
10 product is still for sale and has been for sale.

11 MR. MELSHEIMER: Just one moment, Your
12 Honor.

13 (Pause.)

14 MR. MELSHEIMER: Thank you, Mr. Smith.

15 THE COURT: Redirect?

16 MS. FITZGERALD: Just a few questions,
17 Your Honor.

18 REDIRECT EXAMINATION

19 BY MS. FITZGERALD:

20 Q. Mr. Smith, let's take a look at DX910.

21 MS. FITZGERALD: And, Mr. Diaz, can you
22 pull up the revenue percentage chart that we looked at
23 earlier with -- there it is.

24 Q. (By Ms. Fitzgerald) Do you recall being asked
25 about this chart on cross-examination?

1 A. I do, yes.

2 Q. Now, this says Revenue Percentage By Product.
3 What is this a revenue percentage of?

4 A. Well, as it states, it's a percentage of
5 revenue by product compared to all the other products
6 that we have.

7 Q. We see the percentage for Pricer falling,
8 right? That's the point that was made on
9 cross-examination?

10 A. That's correct.

11 Q. If overall revenue for other products was --
12 was going up, would you expect to see the Pricer
13 percentage go down?

14 A. I would absolutely expect the revenue
15 percentage to change based on that, yes.

16 Q. You were also asked about DX957, which is an
17 e-mail from someone named Howard Thompson. Do you
18 recall that?

19 A. I do, yes.

20 Q. Who was Howard Thompson?

21 A. He was a developer in our development
22 organization.

23 Q. And when did he write this e-mail?

24 A. I'd have to look at it again. I'm sorry. I
25 don't remember the date.

1 Q. Do you remember the circumstances under which
2 he wrote the e-mail?

3 A. I do. There's --

4 Q. And it was -- it looks like it was -- well, you
5 can see the date there for yourself, December 31st,
6 1998.

7 A. Thank you.

8 I do remember the circumstances of this
9 particular e-mail, and I think if -- if we saw the whole
10 e-mail, we'd see a little more, too.

11 But there were a set of people at Trilogy
12 like Howard that came to the company with the motive of
13 actually making a significant amount of money in
14 options.

15 And, you know, frankly, in that
16 competitive timeframe, you know, we're competing on
17 getting high -- high-caliber talent, you know, against
18 Microsoft and all of these top-tier companies, and so we
19 have to look pretty attractive.

20 But in order for people to come to us,
21 they also acknowledge they're giving up some of those
22 things, too. Microsoft has options, real options.
23 We're a private company. We don't have those. And so
24 you get other things, maybe higher salary and other
25 benefits and things like that.

1 You know, Howard got to the point where he
2 didn't like what he was doing, and he wasn't working on
3 new products, and he kept looking back at all the
4 options from Microsoft and these other companies, and he
5 just wanted to leave.

6 Q. Thank you.

7 Next, let's look at DX860, which I believe
8 was the customer survey document or the client
9 satisfaction study that you were asked about on
10 cross-examination.

11 MS. FITZGERALD: And let's turn to the
12 page that ends in 8581, which I believe is Page 33 of
13 the document.

14 Q. (By Ms. Fitzgerald) So what do you see on this
15 page here?

16 A. It appears to have some positive comments
17 regarding the consulting staff.

18 Q. And, you know, I see multiple comments here.
19 These consultants are excellent. They're great with
20 technical problems.

21 Now, you don't -- you don't disagree with
22 Mr. Melsheimer that there was definitely some negative
23 feedback in this document, do you?

24 A. Oh, absolutely not.

25 Q. But was the feedback all bad?

1 A. No, it was not. And we did ask our customers
2 to be very truthful.

3 Q. Thank you.

4 MS. FITZGERALD: We can take this one
5 down, Mr. Diaz.

6 Q. (By Ms. Fitzgerald) The next document I'd like
7 you to take a look at is DX824. This is the e-mail you
8 were asked about in cross-examination from Mr. Liemandt.

9 In hindsight, do you believe that
10 Mr. Liemandt was correct in his belief as to why
11 customers weren't buying Pricer back in April 1998?

12 A. No, not really.

13 Q. And why is that?

14 A. You know, just -- this is just the culture of
15 the software industry. It's a very -- it's very
16 different than manufacturing and some of the other
17 industries. It's a very motivating, very high-pressure,
18 excel, exceed your goals.

19 And, you know, Joe is, I would say,
20 outstanding at motivating people in that manner. And
21 so, you know, a lot of the things he says is actually to
22 motivate the people to do better.

23 And, you know, his -- his views on that
24 are a little harsher probably than others, but, you
25 know, he wanted people to excel. He believed in this

1 product, and he thought we could do better.

2 Q. At the time that Mr. Liemandt wrote this e-mail
3 in 1998, was anyone at Trilogy aware of the fact that
4 SAP was planning or was going in the future to -- or
5 planning to introduce hierarchy access?

6 A. No, not to my knowledge. We were not aware of
7 that at all.

8 Q. I also want to ask you about a customer that's
9 listed in this e-mail.

10 MS. FITZGERALD: I think we need to blow
11 back out to the entire e-mail.

12 Q. (By Ms. Fitzgerald) And you can see that under
13 the heading, Top 10 List for End of Year, it says Lucent
14 for 15 million.

15 Now, going back to the -- the customer --
16 and we also see Sun for 15 million. Did Lucent and Sun
17 become Trilogy customers?

18 A. Absolutely.

19 Q. And let's take Lucent. Do you recall how long
20 Lucent stayed a Trilogy customer?

21 A. Lucent is still a Trilogy customer.

22 Q. Still today?

23 A. Still today.

24 Q. And you were also asked a couple more questions
25 about the market by Mr. Melsheimer, and I just want to

1 ask you one general question.

2 Are you aware of any pricing product in
3 the market from 2006 until now that has the benefits of
4 Mr. Carter's invention but doesn't practice his patent?

5 A. No. We're not aware of any product like that.

6 Q. Thank you.

7 MS. FITZGERALD: I'll pass the witness.

8 MR. MELSHEIMER: May we approach briefly,
9 Your Honor?

10 THE COURT: Yes.

11 (Bench conference.)

12 MR. MELSHEIMER: So this witness, in
13 response to the Thompson e-mail, he said if we could see
14 more of the e-mail, and I'm -- and, of course, it's up
15 there redacted at their request.

16 MS. FITZGERALD: Well, at the time he
17 answered that question, all you could say was the date,
18 the name, and the to and from, and you couldn't see all
19 the complaints that are still clearly in the record. I
20 think that's what he was referring to.

21 MR. MELSHEIMER: He said if we could see
22 more of it, we could see, quote, a lot of other things,
23 and I submit that they've waived their objection to
24 that, and I should be able to go --

25 MS. FITZGERALD: We don't waive our

1 objection. I believe he was talking about the --

2 THE COURT: It's a close question. I'm
3 going to stick with it being redacted.

4 MS. FITZGERALD: All right. Thank you.
5 (Bench conference concluded.)

6 RECROSS-EXAMINATION

7 BY MR. MELSHEIMER:

8 Q. Mr. Smith, just a couple of quick questions.

9 So just so we're all on the same page,
10 860, the survey, does have some positive feedback,
11 right?

12 A. Yes, it does.

13 Q. I mean, it's -- it's a hundred pages or more,
14 and some of it's positive, right?

15 A. Correct.

16 Q. But the conclusion -- the conclusion is that
17 there needs to be substantial improvement for Trilogy to
18 be successful; isn't that right?

19 A. That is right, and that's the desired outcome
20 we wanted.

21 Q. Let's just take a look at Page 124 under
22 Conclusions and Recommendations.

23 Improvements in critical areas of
24 performance will be needed to improve perceptions of
25 Trilogy's competitive standing in the industry and to

1 increase the likelihood that clients will consider
2 Trilogy for providing future services.

3 The majority of respondents view Trilogy's
4 services as about the same or not as good compared to
5 other firms with which they are familiar.

6 That's what it says, correct?

7 A. That's what it says, correct.

8 Q. And with respect to the -- your disagreement
9 with Mr. Liemandt on Exhibit 957 --

10 MR. MELSHEIMER: Do you have that,
11 Mr. Barnes?

12 Q. (By Mr. Melsheimer) Make something clear,
13 that --

14 MR. MELSHEIMER: Strike that.

15 Q. (By Mr. Melsheimer) I'm sorry. You were
16 disagreeing about another Mr. Liemandt e-mail, not this
17 one. This is the Howard Thompson resignation e-mail.
18 Are you with me?

19 MR. MELSHEIMER: 957.

20 A. Sorry. Is that -- was that a question?

21 Q. (By Mr. Melsheimer) I'm sorry. Let me -- just
22 let me restate to orient you, sir.

23 957, this is the Howard Thompson e-mail.

24 A. Yes, sir.

25 Q. His resignation e-mail.

1 A. That's correct.

2 Q. All right. Now, you've had a chance to look at
3 this before, haven't you?

4 A. It's been a while.

5 Q. Right. But, I mean, let's not -- there's no
6 mystery about this.

7 A. Okay.

8 Q. You knew this trial was going to be on, and one
9 of the things you looked at was a lot of e-mails, right?

10 A. Yes, sir.

11 Q. And you looked at this e-mail.

12 A. Yes.

13 Q. Okay. So it's not just Mr. Thompson's view --
14 he's not the -- he's not the lone ranger on his views of
15 what's wrong with Trilogy, right?

16 A. I think every company has people that are like
17 Mr. Thompson. So, yes, he's not the only one.

18 THE COURT: Well, I think his question
19 was: Was he the only one at Trilogy that had shared
20 those views?

21 THE WITNESS: I'm sorry.

22 A. He probably was not.

23 Q. (By Mr. Melsheimer) Did you understand my
24 question?

25 A. I would just say -- how about if you ask me one

1 more time and I just answer it? Sorry.

2 Q. I know you want to suggest that there's other
3 companies out there, too, but this is a case about
4 Trilogy.

5 So I'm asking you, isn't it true that
6 Mr. Thompson was not alone in his negative views about
7 Trilogy's software, about customer issues, about
8 technology, that he was not a lone ranger as to those
9 opinions, right?

10 A. That would be correct.

11 Q. In fact, Mr. Liemandt says there's about 50
12 people at Trilogy. Do you think he's wrong about that?

13 A. I think Joe's a pretty good gauge. If he said
14 it, he probably believed it.

15 Q. Okay. Not so much about the earlier e-mail
16 when he was talking about what -- why Pricer wasn't
17 selling, but with respect to this one, you think he's
18 about right?

19 A. That's what he's saying.

20 MR. MELSHEIMER: Thank you, Mr. Smith.

21 THE COURT: Redirect?

22 MS. FITZGERALD: Nothing further.

23 THE COURT: All right. You may step down.

24 THE WITNESS: Thank you.

25 THE COURT: Who will be your next witness?

1 MR. POLLINGER: Your Honor, Steve
2 Pollinger here for the Plaintiff, Trilogy. We would
3 like to call Mr. Neeraj Gupta, our first expert witness.

4 THE COURT: Okay.

5 (Witness sworn.)

6 NEERAJ GUPTA, PLAINTIFFS' WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MR. POLLINGER:

9 Q. Good morning, Mr. Gupta.

10 A. Good morning.

11 Q. Could you tell the ladies and gentlemen of the
12 jury a little bit about yourself?

13 A. Yes. My name is Neeraj Gupta, and I'm a
14 computer scientist. I grew up in a small town in
15 California, Hayward, California, and I've lived in
16 Austin, Texas, for the past 16 years.

17 I've been married for 13 years. I have
18 three small children. And I've been in the business and
19 technology world for my professional career.

20 Q. Mr. Gupta, what is your role in this case?

21 A. I've been retained by Versata as an expert to
22 offer an opinion on two topics. The first is regarding
23 demand for Mr. Carter's invention, and the second is
24 whether or not SAP's modified software continues to
25 infringe Mr. Carter's patents.

1 Q. Can you tell us about your education, your
2 degrees?

3 A. Yes, sir. I have a bachelor's degree and a
4 master's degree in computer science from MIT. I'm also
5 a graduate of Harvard Business School Executive
6 Education Program.

7 Q. Can you tell the jury about your experience in
8 computer programming, when you started, how long you've
9 been doing it for?

10 A. Yes. I started computer programming at the age
11 of seven. That was the first program I wrote. And I've
12 been programming ever since. I have been programming
13 professionally for 17 years now, 18 years.

14 Q. What is your professional experience in
15 computer programming?

16 A. I started out as a researcher at Xerox and some
17 of its affiliated companies and have been a programmer
18 at Trilogy for quite some time.

19 Q. This case is about Mr. Carter's invention and
20 its use in Trilogy's Pricer product and in SAP's
21 infringing products. Do you bring any special expertise
22 to this case?

23 A. Yes, sir, I do. As I mentioned, I worked at
24 Trilogy for 13 years, so I'm quite familiar with the
25 technology that we're talking about. I've been in both

1 technical and business roles around the Pricer product.

2 Q. Mr. Gupta, do you own any stock in Trilogy?

3 A. No, sir, I do not.

4 Q. What do you currently do?

5 A. I currently run a consulting company. We focus
6 in consulting in patent litigations such as this one.

7 Q. Are you involved with any other companies?

8 A. Yes, sir, I am. I serve on the board of
9 advisors of three technology companies in Austin, Texas.

10 Q. What did you review to do your analysis in this
11 case?

12 A. I've reviewed quite a bit of the evidence.
13 I've reviewed the evidence in the previous determination
14 that SAP infringed Mr. Carter's patents. I've reviewed
15 deposition testimony. I've talked to some of the people
16 involved in the case.

17 I've used SAP's found-to-be-infringing
18 software, as well as SAP's software after the change
19 they've made to attempt to avoid the infringement.

20 Q. Mr. Gupta, does your consulting company charge
21 for your work in this case?

22 A. Yes, sir, they do. They charge my rate at \$400
23 an hour.

24 Q. Does your pay or your company's pay depend on
25 your testimony in this case or the outcome of this case?

1 A. No, sir, it does not.

2 Q. Before we go into the details of your analysis,
3 let's get an overview of your opinions?

4 It was determined in 2009 that SAP has
5 infringed Mr. Carter's '350 patent. That's a given for
6 this case.

7 A. Yes, sir, that is correct.

8 Q. For damages, first issue here, owed by SAP to
9 Trilogy for the infringement, what did you do?

10 A. I determined whether or not customers wanted
11 the invention, whether there was market demand for the
12 invention.

13 MR. BATCHELDER: Your Honor, may we
14 approach?

15 THE COURT: Pardon me just a second.
16 (Bench conference.)

17 MR. BATCHELDER: His opinions and
18 testimony are confined -- they have to be confined to
19 infringement and design out. And I think
20 Mr. Pollinger's questions just now is, they're an
21 established infringer, and then he moved on from there
22 to damages.

23 There's a strong suggestion that the
24 damages that he's talking about are from the prior
25 period. His testimony has to be confined to only the

1 design out period from May 2010 to today. It has to be
2 made clear.

3 MR. POLLINGER: That's not correct.

4 THE COURT: Why is that? Why does it have
5 to be so confined?

6 MR. BATCHELDER: That's what this -- the
7 only infringement issue on the table in this trial is
8 whether the modified software from a year ago infringes.
9 Anything else is about valuation.

10 MR. POLLINGER: Well, that's correct, but
11 he gave two opinions in his expert report.

12 THE COURT: That's right.

13 MR. POLLINGER: One was on whether the
14 design out continues to infringe. That's from 2010
15 forward. His other opinion was about the value of the
16 invention both in Trilogy's product and SAP's product.
17 That goes from 2003 forward.

18 Our other experts have relied upon that in
19 their damages opinion. He's not given the ultimate
20 number, but he certainly has -- he has set forth in his
21 expert report the -- this analysis of demand for the
22 invention as part of his opinion. He was deposed on
23 that.

24 THE COURT: That's -- I've read his
25 report. I mean, why -- why can't he give that

1 portion -- I mean, I've excluded the royalty
2 calculation, but the -- to the extent he gave opinion in
3 his report that related to the demand for the invention
4 by virtue of the Pricer product, I think it has some
5 relevance to lost profits.

6 I'm going to overrule your objection.

7 MR. BATCHELDER: Thank you.

8 (Bench conference concluded.)

9 Q. (By Mr. Pollinger) You need to raise the mic or
10 maybe turn the volume up on that mic. Is that possible?

11 A. Is that better?

12 Q. Or just get a little closer to the mic.

13 A. Great. Sorry.

14 THE COURT: You're asking the wrong
15 person, Mr. Pollinger. Ms. Lockhart here is the
16 technical expert. Let's try it with him --

17 THE WITNESS: No. That's okay. I'm happy
18 to speak closer to the microphone.

19 MR. POLLINGER: Thank you.

20 Thank you, Ms. Lockhart.

21 Q. (By Mr. Pollinger) Mr. Gupta, the question I
22 have is, with respect to the infringement that was
23 determined in 2009 for the damages here owed by SAP to
24 Trilogy for the infringement, what did you do?

25 A. I went to determine whether or not customers

1 wanted the invention, whether or not there was actually
2 market demand for the invention, and in that I
3 determined that there was market demand for the
4 invention.

5 Q. Now, SAP is suggesting that the infringing
6 software has little value because supposedly no one uses
7 it. Do you agree?

8 A. No, sir, I do not.

9 First -- and I want to make it very
10 clear -- that the way these claims are written, use is
11 not required to infringe. But even with that said, I've
12 seen lots of evidence of use and demand for the
13 product -- for the invention.

14 Q. Okay. So as far as our overview goes, that's
15 your first topic: Demand for the invention.

16 The second topic: The infringement
17 question in this trial is whether SAP is still
18 infringing after May 2010. Can you tell us upfront what
19 your opinion is on that?

20 A. Yes. SAP continues to infringe.

21 Q. Let's turn to the details of your analysis.

22 If we could, Mr. Gupta, let's talk about
23 the invention in Mr. Carter's '350 patent.

24 A. Okay.

25 Q. We have slides on that from the 2009

1 presentation. Should we turn to those?

2 A. Okay.

3 MR. POLLINGER: If we could, Mr. Diaz, go
4 to presentation one, Slide 1.

5 Q. (By Mr. Pollinger) Is this here the cover sheet
6 of the '35 patent -- '350 patent on Mr. Carter's
7 invention?

8 A. Yes, sir, it is.

9 Q. How far back does Mr. Carter's patent go in the
10 Patent Office?

11 A. This patent goes back to 1996.

12 Q. That's what we see here?

13 A. Yes, sir.

14 Q. That's when the drawings and the technical
15 specification in his patent was first filed with the
16 Patent Office?

17 A. Yes, sir, that's correct.

18 Q. That's why it's called a continuation; is that
19 correct?

20 A. Yes, sir.

21 Q. The '350 patent, that's the one patent that's
22 in this case, right?

23 A. That is correct. Three claims of that one
24 patent.

25 Q. Now, the latest filing date at the Patent

1 Office for this patent is 1999?

2 A. Yes, sir.

3 Q. But in terms of staking his -- his -- putting
4 his stake in the ground, in terms of the drawings and
5 the specification, the relevant date is 1996; is that
6 right?

7 A. Yes, sir, that's correct.

8 Q. Is that called the effective filing date of the
9 Patent Office?

10 A. Yes, sir, it is.

11 Q. That 1996 date, how far before is that when SAP
12 added the hierarchical access software to its products?

13 A. It's just over two years before.

14 Q. That's the software in SAP's products that was
15 determined to infringe in 2009; is that correct?

16 A. That is correct.

17 Q. Now, we see here the patent issued in 2003?

18 A. Yes.

19 Q. Is that when liability can first start under
20 the patent?

21 A. That is when Versata can first seek damages,
22 that's correct.

23 Q. What do we see here on this next slide from
24 Mr. Carter's '350 patent?

25 A. On this slide, we see a front page of the

1 patent and listed are the three claims at issue in this
2 matter. These are the three claims that SAP was found
3 to infringe.

4 Q. And just for the record, these are Claims 26,
5 28, and 29?

6 A. Yes, sir, they are.

7 Q. What do we see on this next slide here?

8 A. This slide lists the SAP products that were
9 determined to infringe those three claims in 2009.

10 Q. Could you please, for the record, read those
11 out for us?

12 A. Yes. The listing is SAP's R/3 product,
13 Versions 4.6B, 4.6C; Enterprise 47x110; Enterprise
14 47x200; and then also mySAP ERP, Versions 2004, 2005
15 which is also known as 6.0.

16 And then in the CRM family, we see CRM
17 2.0C, 3.0, 3.1, 4.0, 5.0, 6.0, and 7.0; CRM 3 through 4
18 are also sometimes called IPC 3.0 and 4.0, and CRM 6.0
19 is sometimes referred to as CRM 2007.

20 Q. Mr. Gupta, were all of these products, these
21 infringing products, determined to infringe each of the
22 three claims in this case, 26, 28, and 29?

23 A. Yes. SAP was found to directly infringe Claims
24 26, 28, 29; also found to indirectly infringe Claim 29.

25 Q. Is there a particular part of these infringing

1 products that was determined to infringe the patent in
2 2009?

3 A. Yes. It was the computer instructions capable
4 of implementing SAP's hierarchical access execution
5 engine for all of the claims for all of these products.

6 And then for Claim 26, there were
7 additional computer instructions around arranging the
8 hierarchy and storing the pricing information.

9 Q. How does the nature of the infringement compare
10 in these products?

11 A. The nature of the infringement is the same.

12 Q. The jury here will be asked to decide what the
13 damages should be for SAP's infringement by these
14 products.

15 A. Yes, that's the question.

16 MR. POLLINGER: If we can go to Slide 5,
17 please.

18 Q. (By Mr. Pollinger) Mr. Gupta, what is shown on
19 this timeline here?

20 A. There are quite a few things shown on this
21 timeline. To the left of the red line, we see the world
22 as it existed before Mr. Carter's invention was filed,
23 and that is specific to the old SAP's R/3 system, which
24 had an issue of too many tables, too many accesses. And
25 for the jury, we will get into that in detail.

1 The red line represents when Mr. Carter
2 filed for his patent and he solved those issues.

3 And then sometime to the right of that red
4 line, SAP added the now found infringing hierarchical
5 access software into their systems.

6 Q. And what is the -- the date associated with
7 this red line?

8 A. That red line is June 17th, 1996.

9 Q. That's the -- the first filing date for the
10 '350 patent, the one patent at issue in this case?

11 A. Yes, sir, it is.

12 Q. Where does Trilogy's Pricer product, based on
13 Mr. Carter's invention, where does it fall with respect
14 to this red line? Is it on the left, or is it on the
15 right?

16 A. It's on the left of the red line. My
17 understanding is the first sale of that Pricer product
18 was sometime in late '95.

19 Q. And how does that compare to when SAP added the
20 hierarchical access software to its products?

21 A. It was before SAP added their software.

22 Q. Almost three years?

23 A. Yes, sir, about three years.

24 Q. The 2009 determination was about this
25 hierarchical access software. In this case, in terms of

1 damages and infringement after May 2010 is also about
2 this hierarchical access. So let's -- let's talk about
3 that a little bit.

4 Here we have on the screen one of SAP's
5 documents. It's PX19. What does this say about SAP's
6 hierarchical access software?

7 A. Well, this -- this slide is actually talking
8 about the world before SAP released its hierarchical
9 access software.

10 We see that before hierarchical accesses
11 in the SAP system, you would need to create many tables
12 and many accesses to those tables and that that would
13 represent a major drawback when dealing with special
14 data, such as product hierarchies or customer
15 hierarchies.

16 Q. What does this next slide show from the patent
17 and the SAP document, PX19?

18 A. From the patent -- this is the background
19 section of the patent. It shows that Mr. Carter, in his
20 background section and in SAP's manuals, are very
21 similar. They both describe the old SAP product as
22 requiring a number of tables and a number of accesses.

23 Q. On the -- oops. On the left here, where do I
24 see the patent talking about a number of accesses?

25 A. Oh, I'm sorry. That's the word queries. The

1 patent uses the term query to represent access. They're
2 the same thing.

3 Q. Mr. Gupta, would it be helpful if I gave you a
4 laser pointer?

5 A. That would be great.

6 MR. POLLINGER: Your Honor, could I
7 approach the witness?

8 THE COURT: Yes.

9 MR. POLLINGER: If we could go to Slide 9,
10 please.

11 Q. (By Mr. Pollinger) The next slide here shows
12 another SAP document. This is PX145. What does this
13 document say about maintenance and performance?

14 A. Again, this is describing the SAP system before
15 they added the hierarchical access and you can see in
16 the yellow highlight over here that the old SAP system
17 had the disadvantages of lots of maintenance and reduced
18 system performance, which is what Mr. Carter was talking
19 about with the inflexibility and the slow speed of the
20 SAP system.

21 Q. What does this slide here show from the patent
22 and that SAP document, PX145?

23 A. This -- this slide describes the world after
24 Mr. Carter's patent and with SAP's infringing
25 hierarchical accesses as having the same advantages,

1 specifically a speed advantage, because of the patented
2 invention and then also a simplified maintenance because
3 of the patented invention.

4 Q. Do we have an illustration to describe the
5 problem in SAP's old products before they added the
6 infringing software?

7 A. Yes. This was used in the previous
8 determination, and I think it's appropriate. I know
9 there's a lot of stuff on the slide over here, so bear
10 with me, please.

11 We liken -- I liken the older SAP system
12 to being like fishing, fishing with a pole specifically.
13 And we'll talk about these fish on the screen, but that
14 represents pricing information, how much something
15 costs, what's the discount, how much tax.

16 In Mr. Carter's patent, he teaches people
17 to use hierarchies of groups to find appropriate pricing
18 information, and that's what you see here. It's one of
19 the figures from the Carter patent.

20 And what's described in the old SAP system
21 and how it would deal with those types of hierarchies,
22 in the old SAP system, you would cast your pole, try to
23 find a fish in one of these many tables.

24 If you could find that pricing
25 information, great. And if you couldn't, you would reel

1 it in, cast again, and work your way up the hierarchy
2 until you could find the fish you were looking for.

3 I'll depict that with these try, try, try
4 fishing pole icons, and then when you finally have one,
5 you have what you're looking for and you can stop.

6 We won't be talking about fishing too
7 much, but on the bottom right, we see that SAP's system
8 does have a number of tables with which it would fish
9 into, and I'll show -- I have a demonstration of this,
10 Mr. Pollinger, if we could go to that.

11 MR. POLLINGER: Mr. Diaz, if we could run
12 the animation, please.

13 A. We're going to show how that fishing analogy
14 now applies into more technical detail in the old SAP
15 system.

16 Mr. Carter's patent teaches two types of
17 hierarchies: A customer hierarchy and a product
18 hierarchy. And the old SAP system, there would be
19 tables that represented combinations of information from
20 these types of hierarchies.

21 It would fish in the first table, and if
22 it couldn't find what it was looking for, the pricing
23 information, it would fish in the next table. Again, if
24 it could not find the pricing information it was looking
25 for, it would fish in the next table, onward and onward

1 and onward.

2 I believe you heard Mr. Carter testify
3 that it would be not uncommon to have hundreds of these
4 tables in pricing systems. So you can imagine, if
5 you're looking for sophisticated, complicated pricing,
6 the number of different times you have to fish would be
7 large, and this is what causes the system to be slow and
8 hard to maintain.

9 Q. (By Mr. Pollinger) Okay. That was the problem
10 in -- in SAP's old products. Let's now turn to
11 Mr. Carter's solution in the '350 patent. Do we have an
12 illustration for that?

13 A. Yes. Mr. Carter's invention is a lot like
14 fishing with a net, which is far more efficient but
15 different than fishing with a pole.

16 Q. Do we have an animation on that?

17 A. I do.

18 MR. POLLINGER: Could we go to that,
19 please?

20 Q. (By Mr. Pollinger) And please describe it to
21 us, if you would.

22 A. Again, here we see the same type of hierarchy,
23 but now using Mr. Carter's invention. What Mr. Carter
24 teaches everyone to do is to instead fish with a net.
25 And when you go to fish, go pick up all of the fish, all

1 of the pricing information that you might need in
2 calculating the price.

3 Now, in Mr. Carter's invention, you
4 actually do get more fish than you're going to use.

5 So then he also then says sort and order
6 the fish or the pricing information from the least to
7 most specific.

8 Eliminate the pricing information that
9 you're not going to use because it's less restrictive.

10 And finally, apply the pricing information
11 that you are going to use to get the price.

12 We can see that in Mr. Carter's invention,
13 he fishes with the net; he sorts the information; he
14 eliminates what he's not going to use; and then he does
15 apply what he is. You get to the same answers but in a
16 far more efficient manner.

17 MR. POLLINGER: Could we go to Slide 19,
18 please, Mr. Diaz?

19 Q. (By Mr. Pollinger) What is shown here,
20 Mr. Gupta?

21 A. What we're looking at here is Claim 26 of
22 Mr. Carter's patent. It's the most detailed of the
23 three claims that are in this case.

24 What I call out on this particular slide
25 are some of the claim words, but then more importantly,

1 just -- just to orient everybody, we're looking at the
2 four specific places where Mr. Carter had his key
3 inventions, the retrieve, sort, eliminate, and apply
4 steps.

5 Q. What's shown on this next slide here from the
6 patent?

7 A. We show one of the technical diagrams in
8 Mr. Carter's patent describing and teaching everybody
9 how to do what he's claiming. And, again, you see the
10 same steps of the retrieve, sort, eliminate, and apply,
11 which are called out in Mr. Carter's teaching diagram.

12 MR. POLLINGER: If we could go to
13 Slide 22, please.

14 Q. (By Mr. Pollinger) Okay. We've talked about
15 the problem in SAP's old product. We've talked about
16 Mr. Carter's solution. Now let's turn to SAP's
17 infringing products.

18 Does this document, PX145, say anything
19 about SAP's infringing hierarchical access software?

20 A. Yes. It says a lot on this one slide. We see
21 at the top, or with hierarchical access, SAP now says
22 that you can have a single table with a single access.

23 And on the bottom, it talks about having
24 the same thing where you can solve the problems of the
25 prior SAP system by having that single access to a

1 single table.

2 Q. Mr. Gupta, do we have some slides from the 2009
3 presentation on infringement illustrating how the
4 infringing hierarchical access software works?

5 A. Yes, we do. If you could go to those.

6 MR. POLLINGER: If we could go to
7 Slide 25, please, Mr. Diaz.

8 Q. (By Mr. Pollinger) What does this slide here
9 illustrate on how the infringing software works?

10 A. The next four slides are going to be similar.
11 I want to orient everybody first.

12 What we're looking at here is a screen, an
13 actual screen from the infringing SAP system. This is
14 the one that was found to infringe in 2009.

15 This first screen shows, on the left-hand
16 side, that, in fact, it has fished with a net. The
17 system has pulled over five pieces of pricing
18 information or five fish.

19 Q. What do you show on this next slide here?

20 A. On this next slide, we show that it's, in fact,
21 sorted them from least to most specific. And I forgot
22 to point out that this whole time, we're dealing with
23 hierarchical accesses over here.

24 Q. And this next slide?

25 A. This is the eliminate step where each of those

1 red dots indicates that the SAP infringing system has
2 eliminated the pricing information that it's not going
3 to use.

4 Q. And this next slide?

5 A. This slide shows that it has applied the
6 pricing information that it is going to use.

7 Q. What specifically in SAP's infringing products
8 provides the ability to do this retrieve, sort,
9 eliminate, and apply shown here?

10 A. That is the computer instructions for the
11 hierarchical access execution engine.

12 Q. What does this summary slide here show?

13 A. This is just a quick summary of what we've been
14 looking at. The world before the Carter patents -- the
15 Carter invention, we see that the SAP system had too
16 many tables, too many accesses.

17 Mr. Carter solved the problem by fishing
18 with a net. And then SAP added hierarchical access,
19 which did the same thing.

20 Q. Okay. We've covered the infringing products as
21 determined in 2009 on the bottom there. Let's -- right
22 here on the bottom. Let's now turn to the modified
23 products from May 2010 forward.

24 A. Okay.

25 Q. What did SAP do in 2010 to try to avoid the

1 infringement determination?

2 A. In May of 2010, SAP released a small patch to
3 their infringing system.

4 Q. Did that 2010 patch change how their products
5 do this retrieve, sort, eliminate, and apply?

6 A. No, sir. That patch did not affect retrieve,
7 sort, eliminate, and apply.

8 Q. And, again, what software does that retrieve,
9 sort, eliminate, and apply?

10 A. That's the hierarchical access execution
11 engine.

12 Q. Did the 2010 patch remove or change any of that
13 software?

14 A. No, sir. None of the computer instructions for
15 that hierarchical access were removed or changed.

16 Q. Is the ability to do this with SAP products
17 still in there after the patch is installed?

18 A. Yes, sir, it is.

19 MR. POLLINGER: If we'll go to Slide 4,
20 please.

21 Q. (By Mr. Pollinger) Here on this screen is a
22 list of the modified products after May 2010. How does
23 this list -- oh, and let he ask you this first: What
24 you just told us, that the retrieve, sort, eliminate,
25 apply has not changed with the patch, is that true for

1 all of these modified products of SAP after May 2010?

2 A. Yes, sir, it is true.

3 Q. How does this list of modified products compare
4 to a list of infringing products that you read off for
5 us?

6 A. This is the same list of infringing products
7 with the single exception that we've now added the patch
8 into each of these.

9 Q. Well, when the patch is installed, what changes
10 in SAP's products?

11 A. SAP makes a change to one of their editing
12 screens in the product.

13 MR. POLLINGER: If we'll go to Slide 98.

14 Q. (By Mr. Pollinger) Does this slide relate to
15 that?

16 A. Yes, sir. This is the single editing screen
17 that is affected by a patch.

18 Q. Can you tell us what the 2010 patch changed
19 here?

20 A. Yes, sir. In the 2010 patch, you can no longer
21 put these A's next to the KNVH type customer hierarchy.
22 You can type them in the screen, but you cannot store
23 them in the database.

24 Q. Can you type that letter A there for other
25 types of customer hierarchies, other than that one type,

1 the KNVH type?

2 A. Yes, sir. You can type it in there for every
3 other type of customer hierarchy. You can type it in
4 there and save it.

5 Q. If that one type, the KNVH type, of customer
6 hierarchy is used, can you get that letter A in there
7 with other editing tools?

8 A. Yes, sir. SAP just disabled this one editing
9 tool. Other editing tools can be used to put that A in
10 there for the KNVH-type customer hierarchy.

11 Q. If you have that A in there already for one of
12 those specific types, the KNVH type, you have your A's
13 in there before May 2010, when you install the patch,
14 does the patch pull those A's out of there?

15 A. No, sir. The patch leaves all the A's that
16 were already there in there.

17 Q. Does the 2010 patch block using the infringing
18 software with pricing sequences made before the patch?

19 A. No, sir. Every pricing sequence that was in
20 before the patch remains fully functional.

21 Q. Does the patch change the way the infringing
22 hierarchical access software operates?

23 A. No, sir. That hierarchical access engine works
24 exactly the same way.

25 MR. POLLINGER: If we'll go to Slide 30,

1 please.

2 Q. (By Mr. Pollinger) What do you show on this
3 slide here?

4 A. This is very similar to the summary slide we
5 showed last time. We show that SAP's infringing system
6 worked just like the patented invention. I'm now
7 showing that the modified system from May 2010 forward
8 works just like their infringing system, which is just
9 like the patent.

10 Q. Okay. Let's now turn to damages for the
11 infringement.

12 THE COURT: Well, before we start on a new
13 subject, Mr. Pollinger, we're going to take our morning
14 recess.

15 Ladies and Gentlemen, take 20 minutes. Be
16 back ready to come in the courtroom at 10:35. Remember
17 my prior instructions, and don't talk about the case.
18 Have a nice recess.

19 LAW CLERK: All rise for the jury.

20 (Jury out.)

21 THE COURT: All right. Court's in recess.

22 (Recess.)

23 LAW CLERK: All rise.

24 (Jury in.)

25 THE COURT: Please be seated.

1 Continue.

2 MR. POLLINGER: Thank you, Your Honor.

3 Q. (By Mr. Pollinger) Okay. Mr. Gupta, you've
4 got two issues, let's turn to your first one. Let's
5 turn now to damages for the infringement.

6 Let's look at demand for the invention in
7 the market. That goes to the damages issue. What did
8 you look at here?

9 A. I looked to see if there was marketplace demand
10 for the patented invention. I looked at a lot of
11 evidence around that.

12 Q. Did you look at whether there was demand for
13 the invention in Trilogy's own product, the Pricer
14 product, as well as the -- in the infringing SAP
15 products?

16 A. Yes, sir. I looked to see if there was demand
17 for the invention, both in Pricer, Trilogy's product, as
18 well as demand for the invention in SAP's products.

19 Q. Does Trilogy's own product, the Pricer product,
20 does it embody the invention of the three claims of the
21 '350 patent in this case?

22 A. Yes, it does. I did a detailed analysis of the
23 claims at issue in this case, including the Court's
24 constructions and definitions, and have concluded that
25 the Trilogy Pricer product does, in fact, embody all

1 three claims of the Pricer patents.

2 Q. Why did you look at Trilogy's Pricer product to
3 see if there was demand for Mr. Carter's invention?

4 A. Trilogy's Pricer product really was the best
5 benchmark that was available for a -- for a variety of
6 reasons. Firstly, it was the product that sold the
7 patent in the most isolated manner and so we got a
8 really close look at demand and value of the invention.

9 Secondly, there were lots of market
10 transactions for the Pricer product and so we had a lot
11 of information from which to do an analysis.

12 And number three, Trilogy's own strategy
13 was to sell the Pricer product as a bolt-on on top of
14 the SAP pre-existing system, so we get a very good look
15 of the value of the Pricer invention or the Carter
16 invention on top of an SAP system which does not have
17 the invention.

18 MR. POLLINGER: Mr. Diaz, if you go to
19 Slide 19 in presentation two.

20 Q. (By Mr. Pollinger) What -- what do you
21 illustrate here, Mr. Gupta?

22 A. This is a very simple graphic to reinforce the
23 point I was making on why Pricer is a good benchmark to
24 use. We see that Trilogy strategy and -- was to sell
25 the Pricer product as a bolt-on to SAP's system. That

1 Pricer product filled a need in the SAP system that
2 customers had and we can see that the analysis shows
3 that the invention is embodied within the product.

4 Q. Is that the patent that you show here?

5 A. Oh, yes, sir, I forgot I had a pointer.

6 Q. So this is Trilogy's Pricer product?

7 A. Yes, this is Trilogy's Pricer product. It's
8 filling a need inside of the old noninfringing R/3
9 system that customers had and specifically it's the
10 invention within the Pricer product which is filling
11 that need.

12 Q. What's in red is -- is SAP's old product before
13 they added the infringing software?

14 A. Yes, sir, that's correct.

15 Q. Well, what do you show on this next slide here?

16 A. What I show here is what happens to the
17 marketplace after SAP adds the software that's now found
18 to infringe. They have filled the need in their own
19 system using their own computer instructions and that is
20 to the hierarchical access feature. We see that they've
21 also filled a need using the very same invention that
22 Mr. Carter had.

23 Q. Is that a representation of the '350 patent
24 there on -- on SAP's product?

25 A. Yes, that's what it's supposed to be.

1 Q. And what do you show on this next slide here?

2 A. This is just those same two graphics side by
3 side to illustrate that once SAP has filled the market
4 need using the Carter patents, they've all but destroyed
5 the market for a bolt-on product that had the benefits
6 of the Carter invention.

7 Q. Did you look at Trilogy's sales contracts with
8 respect to demand?

9 A. Yes, sir, I did.

10 Q. Did you choose specific ones?

11 A. Yes. I looked at almost 80 of the Trilogy
12 sales contracts for which customers bought the Pricer
13 product. From those I chose the 21 contracts that best
14 isolated the value of Pricer. We heard, I think,
15 Mr. Dholakia and Mr. Carter and Mr. Smith talk about
16 some of the those companies today.

17 Q. What did you conclude from those 21 contracts
18 that you chose?

19 A. Well, I concluded that those contracts were
20 because of the invention.

21 Q. Did you do a numeric analysis?

22 A. Yes, sir, I did. As Mr. Carter testified,
23 these contracts were because of the Carter invention. I
24 conducted a numerical analysis using the features and
25 functionality that differentiated Pricer in the

1 marketplace, and that analysis shows that 63 percent of
2 the market demand for the Pricer product was due to the
3 claimed combination of features inside of the Carter
4 invention. And so yes, I agree with Mr. Carter that his
5 invention is what drove those contracts.

6 Q. Did you analyze whether the market demand for
7 Pricer was due to the invention itself or the computer
8 programming in Pricer?

9 A. Yes, I did.

10 Q. And what did you conclude?

11 A. I concluded that the demand for Pricer was due
12 to the invention.

13 Q. What was the evidence of demand for the
14 invention that you saw in your analysis?

15 A. There was quite a bit of evidence for demand
16 for the invention. You know, one of the strongest
17 pieces of evidence of demand is that once SAP was found
18 to infringe, they, in fact, did not take out the
19 patented technology. They left -- left it in so the
20 current customers could keep using it.

21 Also, when we look at the -- within the
22 SAP world, we see that before SAP had the patented
23 technology in their system, Versata was able to sell
24 their invention into the SAP marketplace for on average
25 two million dollars per customer contract.

1 Q. Do SAP's own documents reflect demand for the
2 invention?

3 A. Yes, there's quite a few documents that do
4 reflect that demand.

5 Q. Is this one of those at Exhibit PX493?

6 A. Yes, this is one of them.

7 Q. And what does this show?

8 A. I believe this document is from early 1998 and
9 what this shows, it's a SAP document, and it shows that
10 SAP recognizes that Trilogy with its pricing
11 capabilities is the market leader visionary. It
12 recognizes that SAP believes Trilogy and its product are
13 the best of breed for these kinds of sales systems.
14 This is indicative of demand that SAP is recognizing
15 Trilogy has demand for its products.

16 Q. When was this time period relative to Trilogy's
17 Pricer product with the invention and SAP adding the
18 infringing software to their products?

19 A. This was after Trilogy's Pricer product with
20 the invention but before SAP added its infringing
21 products -- infringing capabilities.

22 MR. POLLINGER: Let's go to Slide 24,
23 please.

24 Q. (By Mr. Pollinger) This document from SAP here
25 is Exhibit PX2137. What does this show?

1 A. This is a document from one of SAP's customers,
2 Bridgestone Firestone, and it was written in 1998. It's
3 an e-mail from Bridgestone to SAP explaining to SAP that
4 they have to bolt-on a third party's pricing software to
5 SAP's old system, R/3 is SAP's old system.

6 That pricing software actually was
7 Trilogy's and the reason for doing so is because SAP
8 system had large gaps. Now, one of those gaps
9 specifically is the flexibility to mix different levels
10 of material and customer groups in a single access.
11 We'll see that those are customer and product
12 hierarchies in the single access we've discussed.

13 Q. This SAP document here is Exhibit PX259. What
14 does this show?

15 A. This is a 1995 e-mail from one of SAP's sales
16 reps that says that this rep's customer wants to do a
17 Trilogy interface unless SAP can provide a useable
18 alternative. He then goes on to say he would like to
19 avoid Trilogy like the plague, which is indicative of
20 demand from his customer and concern by him as an
21 individual.

22 Q. Who is wanting to avoid Trilogy like the
23 plague?

24 A. This would be SAP's sales rep.

25 Q. What do we see from this SAP document here,

1 PX493?

2 A. This is from a 1998 SAP strategy document
3 written by SAP where they talk about one of their major
4 objectives being to prevent further penetration by
5 Trilogy into the R/3 customer base. This indicates to
6 me that that one sales rep's feeling was not unique,
7 that there's broad base demand for this capability
8 within the SAP customers.

9 MR. POLLINGER: Could we go to Slide 28,
10 please?

11 Q. (By Mr. Pollinger) What do we see here from
12 this SAP document, PX270?

13 A. Yes, I think we've seen this document before.
14 This is a SAP document also written in 1998 where SAP is
15 trying to find out how to address this demand and
16 they're suggesting putting in the pricing functionality
17 which is now found to infringe bundled into the SAP
18 system, specifically doing that to discourage the usage
19 of third-party components. And so this now suggests
20 they're acting on their aspiration to prevent the
21 penetration by -- by blocking Trilogy and those
22 customers.

23 Q. Do these SAP documents indicate demand for the
24 invention in SAP's products?

25 A. Yes, sir, they do.

1 Q. Do we have an explanation from SAP as to why
2 they added the infringing software to their products?

3 A. Yes. Dr. Zencke, SAP's global head of research
4 at the time frame, gave a very specific answer to that
5 question in his deposition.

6 Q. If you could, would you please read the
7 question and the answer to us from Dr. Zencke's
8 deposition?

9 A. Yes.

10 The question was: Okay. Why did SAP
11 develop this hierarchical access functionality?

12 His answer: Because there were customers,
13 big customers actually, who said: You know what, we
14 have to maintain hundreds and thousands of price lists
15 in a regular way, and hundreds of thousands of price
16 lists, and so the manual work to do that job, whatever
17 you can do to make that easier, faster, is of value for
18 us.

19 I think the you in that is what you, SAP,
20 can do and the for us, is for our customers, for the
21 customers.

22 Q. Mr. Gupta, was Mr. Carter's invention obsolete
23 by the time his '350 patent issued in 2003?

24 A. No, sir. In 2003, Mr. Carter's invention had
25 very important capabilities.

1 Q. Well, with respect to that, let's look at a
2 couple of documents that SAP turned over to us.

3 MR. POLLINGER: Mr. Diaz, if we could,
4 please, go to PX2120, the first page.

5 Q. (By Mr. Pollinger) What is this here,
6 Mr. Gupta?

7 A. This is a case study commissioned by one of
8 SAP's customers, Andrew Corporation in 2006.

9 MR. POLLINGER: If we could, please go to
10 Page 14.

11 Q. (By Mr. Pollinger) Mr. Gupta, what do we see
12 in that box there where it says truthfulness?

13 A. Well, this is the SAP customer talking about
14 their CRM implementation and is telling everyone, hey,
15 I'm going to be truthful about this. I think that's
16 important now.

17 MR. POLLINGER: Let's go to Page 21.

18 Q. (By Mr. Pollinger) If we look three lines
19 down, it says: Data replication is critical. What is
20 that?

21 A. That's -- that's the disconnected usage that
22 Mr. Carter was talking about. This is using that
23 pricing invention on a laptop or a mobile handheld
24 somewhere, and what he's saying is that it's important
25 to move the data from the home office to here. Because

1 it's on a handheld, we know that performance is
2 important. Those are smaller machines and you have to
3 have high performing systems when working away from the
4 home office.

5 Q. And it's saying this is critical in what year?

6 A. This is 2006 in which he's saying this is
7 critical.

8 Q. And what do we see here in this -- this second
9 to last bullet where it says: No customer hierarchy or
10 product hierarchy was available?

11 A. Well, in this over here, he's saying it's
12 really important to have those customer and product
13 hierarchies also available on the handheld, just as
14 Mr. Carter's invention taught.

15 MR. POLLINGER: Mr. Diaz, if we could,
16 please go to Exhibit PX956.

17 Q. (BY MR. POLLINGER) This is an e-mail that SAP
18 turned over to us in this case.

19 MR. POLLINGER: If you could, Mr. Diaz,
20 please blow out the top.

21 Q. (By Mr. Pollinger) We see this is an e-mail
22 from 2007. It is from Wolfgang Nieswand. Who is
23 Dr. Nieswand?

24 A. Dr. Nieswand is an executive at SAP.

25 Q. And -- and he goes by Doctor because he has a

1 Ph.D. in engineering; is that correct?

2 A. Yes, sir, that's my understanding.

3 MR. POLLINGER: If we could go down to
4 the -- a little ways to where it says objective.

5 Q. (By Mr. Pollinger) It says objective there,
6 and here it says customer needs hierarchical access.

7 A. Yes, sir, I see that.

8 Q. And then it says key to their business?

9 A. Yes, sir.

10 Q. What is -- what does that indicate?

11 A. Well, I -- I think the words speak for
12 themselves. This is a 2007 e-mail from Dr. Nieswand
13 that's -- that's saying that this customer needs
14 hierarchical access, and having that capability is key
15 to their business. And, in fact, I know some more about
16 this customer, they're -- they're running their systems
17 both on a handheld as well as the home office.

18 Q. Does this tell us anything about whether
19 hierarchical access was obsolete in 2007?

20 A. Well, it tells us that it was not obsolete in
21 2007.

22 Q. Looking at something else here now, do we have
23 any direct answers from SAP's customers as to whether
24 they use the infringing hierarchical access software?

25 A. Yes, sir, we do. We have about 40 of those

1 answers from SAP's customers.

2 MR. POLLINGER: If we can go back to the
3 presentation, please, Mr. Diaz. Go to Slide 30.

4 Q. (By Mr. Pollinger) Does this slide relate to
5 those deposition answers from SAP's customers?

6 A. Yes, sir, it does.

7 Q. The three claims that Mr. Carter's patents talk
8 about the capability to price based on customer and
9 product hierarchies. Do the deposition answers from
10 SAP's customers indicate that they do that with SAP's
11 infringing software?

12 A. Yes, sir, it indicates that they likely do.

13 Q. And is there any indication of what percentage
14 of customers answering the deposition questions do that?

15 A. Yes. 20 percent -- sorry. 50 percent of the
16 customers use hierarchical access, and of those, 14 in
17 that green box most likely use both the customer
18 hierarchy and the product hierarchy.

19 Q. Could you point out a few of the companies here
20 for us?

21 A. They're -- they're large household names. IBM,
22 Shell, Hewlett Packard, Coca-Cola, Procter & Gamble.

23 Q. Yeah, that -- so that first section there are
24 customers that said we use both customers and product
25 hierarchies; is that right?

1 A. Those 14 customers say that they use customer
2 hierarchies and product hierarchies and hierarchical
3 access.

4 Q. Based on your experience, is it common to price
5 based on customer and product hierarchies?

6 A. Well, absolutely. As Mr. Carter testified to,
7 a key thinking he had before he produced his invention
8 was he'd like to have the pricing system mimic the real
9 world and priced based on the way people thought about
10 it, who is buying what. And, you know, we've all seen
11 experiences of these.

12 I think a good one we're used to is truck
13 month in Texas, we're talking about trucks and Texas,
14 both of which are in a hierarchy of a type of product
15 and the information, like the customer, the geography.

16 Q. So in that example you've got the product
17 hierarchy is the trucks and then the customer hierarchy
18 is the customers in Texas?

19 A. Yes. I would say Texas would be in a hierarchy
20 of -- of -- of geography and trucks would be in a
21 hierarchy of products.

22 MR. POLLINGER: Mr. Diaz, if we could,
23 please go to PX2119.

24 Q. (By Mr. Pollinger) This is another SAP e-mail.
25 We see at the top here that this is from 2007, and in

1 the body in the second paragraph where it starts off
2 would, it says there in the second sentence in that
3 first part: Most implementations use the customer
4 hierarchy and product hierarchy in the pricing to reduce
5 the number of records.

6 A. Yes, sir, I see that, that's consistent with
7 what I just said. I think this e-mail was written in
8 2007. It's real small, but you can see it there. And
9 the subject is a description of ERP, which is the
10 infringing SAP system requirements, and that most
11 customers would use a customer and a product hierarchy
12 in pricing.

13 Q. Mr. Gupta, is there anything else in this case
14 that indicates customer demand for Mr. Carter's
15 invention in SAP's products?

16 A. Yes, there is. You know, when SAP was first
17 informed by Trilogy that they infringed the -- the
18 Carter patents, SAP didn't just say, oh, now that we
19 know, let's go ahead and take it out because no one uses
20 it.

21 Instead, when they were found to infringe
22 in 2009 and attempted to work around the patents, they
23 made sure that every one of the customers that was
24 continuing to use -- sorry, that was using the
25 infringing capabilities could continue to use it the way

1 they were. I think that is very indicative of their own
2 customers having demand.

3 Q. Have you seen any alternative to Trilogy's
4 Pricer product or SAP's infringing products?

5 A. No, sir, I have not seen any alternative to the
6 Pricer or the SAP infringing products that do not use or
7 practice the claims of Mr. Carter's patent.

8 Q. Okay. That was your first topic. That was
9 demand with respect to damages. Now, let's turn to your
10 second and last topic.

11 Let's turn to the question of whether SAP
12 is still infringing after they installed that patch in
13 May of 2002 -- excuse me, 2010. Let's turn to the
14 question of whether SAP's modified products continue to
15 infringe after May 2010.

16 A. Okay.

17 Q. To see if there's patent infringement,
18 what do -- what do we have to do?

19 A. To see if there's patent infringement, we have
20 to look at the claims of the patent and make sure that
21 given the Court's constructions, that each and every
22 element of at least one of those claims is met by the
23 accused product.

24 Q. Is that applying the Court's claim
25 constructions?

1 A. Yes, sir, it is.

2 Q. The Jurors have those in their notebooks?

3 A. Yes, I believe they do and we'll be going
4 through some of those later on.

5 Q. Do all the claims -- do all three of the claims
6 have to be met for there to be infringement?

7 A. No, sir. If any one of the claims of a patent
8 is infringed, then the patent is infringed.

9 Q. In 2009 it was determined that SAP infringes
10 the three claims of the '350 patent. The question now
11 is whether the modified products still infringe those
12 three claims.

13 A. Okay.

14 Q. Now, here I've got the poster boards that were
15 used in the 2009 presentation for the three claims.
16 This is Claim 26. I'll put them out here. This is
17 Claim 28. And this is Claim 29.

18 And it's showing that SAP products in 2009
19 infringe all the parts of the claims were checked off.
20 Is -- is our question now whether these checkmarks still
21 apply to SAP's modified products with the patch after
22 May 2010.

23 A. Yes, sir, that's the -- that's the question
24 I've been asked to -- to look at.

25 MR. POLLINGER: If we go to Presentation

1 1, Mr. Diaz, please. Go to Slide 32.

2 Q. (By Mr. Pollinger) Here is Claim 26 on the
3 screen. It's right there as well, on the poster board,
4 from the 2009 determination with -- with all the parts
5 of Claim 26. What was shown, Mr. Gupta, in 2009 in
6 SAP's infringing products to meet each of the parts of
7 Claim 26?

8 A. Well, the retrieve, sort, eliminate, and apply
9 steps that we've been talking about were met by the
10 computer instructions which implemented the hierarchical
11 access execution engine. The computer -- the customer
12 hierarchy, product hierarchy, and storing limitations
13 were met by computer instructions for other parts of the
14 SAP system, and that those computer instructions were on
15 computer media, you know, delivered or downloaded by SAP
16 to its customers.

17 Q. And that shipping and delivery of a software
18 both on the DVDs and over the internet to the customer
19 computers, was -- was that part of the infringement?

20 A. Yes, sir. These claims are infringed when SAP
21 makes the DVDs, sells the DVDs, delivers them to its
22 customers, allowed the download of those instructions to
23 the customer computers or, in fact, uses the software in
24 its own operations, testing, development, training,
25 those kinds of thing.

1 Q. Did we see evidence of that?

2 A. Yes, we saw lots of evidence of that.

3 Q. Did SAP change or remove any of those computer
4 instructions on May 6, 2010 with its patch, the ones
5 that were shown to -- to meet all the parts of Claim 26?

6 A. No, sir. In the previous determination, the
7 computer instructions that were shown to meet each and
8 every one of these limitations is still in the SAP
9 system. Nothing was removed or changed.

10 MR. POLLINGER: Go to Slide 35, please.

11 Q. (By Mr. Pollinger) What is illustrated here
12 from the 2009 presentation?

13 A. On the right-hand side, we see a graphic
14 depiction of computer instructions. Source or object
15 code representing the capability to do what the claims
16 require.

17 On the left-hand side, we see DVDs and
18 computers where those computer instructions are put on
19 the DVDs and sent to customers or downloaded by
20 customers on to their computers where, as I mentioned,
21 used within SAP in its own enterprise. All of these
22 activities happened in the United States.

23 Q. And the computer instructions that were pointed
24 to in the 2009 determination, have any of those been
25 changed by the patent?

1 A. No, sir, they have not.

2 Q. What does this tell us about whether SAP's
3 modified products infringe Claim 26 on this poster board
4 from the 2009 presentation?

5 A. Well, it tells us that they must keep
6 infringing Claim 26 in the exact same manner they
7 infringed in the 2009 determination.

8 Q. What about Claim 28 here on this center poster
9 board and Claim 29 over here on the Jury's left?

10 A. Claims 28 and 29 also continue to be infringed
11 in the exact same manner they were found to be infringed
12 in -- in 2009.

13 Q. So do these checkmarks on these three poster
14 boards in 2009, do they still apply with respect to the
15 modified products with the patch?

16 A. Yeah, I'm assuming they're all checked off. I
17 can't see them, Mr. Pollinger, but if they are then,
18 yes.

19 Q. You can stand up if you'd like.

20 A. If you need me to, I will.

21 Q. No, that's okay.

22 A. Okay.

23 Q. Well, what, then, is SAP arguing on this -- on
24 this patch?

25 A. I believe SAP's argument to be that they have

1 now blocked some usage of the infringing capabilities.

2 Q. Is use required for there to be infringement?

3 A. No, sir. As we've discussed, for these claims,
4 use is not required for there to be infringement.

5 Q. Nonetheless, is the software still used in the
6 U.S.?

7 A. Yes, sir, there's lots of evidence that it is
8 used in the U.S.

9 Q. Well, even though use isn't required, did you
10 look at whether these infringing computer instructions
11 that were pointed to in 2009 can still be used in the
12 manner set forth in the three claims?

13 A. Yes, sir, I did.

14 Q. And what did you conclude?

15 A. I concluded that these infringing computer
16 instructions can be put to use in a variety of ways even
17 after the patch.

18 Q. Let's turn to that. If we could -- I think you
19 just mentioned that it could continue to be used in the
20 claim matter after -- after the patch in May 2010?

21 A. Yes, sir, in a variety of ways.

22 Q. And what were those ways?

23 A. Well, the first is they can continue to be used
24 with any of the pre-existing pricing information that
25 was already set up by the customers who were using them.

1 Secondly, by using a data editing tool,
2 you can put some A's in the database yourself and keep
3 using it the exact same way it was used before.

4 And thirdly, SAP only turned off one very
5 specific type of customer hierarchy from being set that
6 did not even address all of the other types of customer
7 hierarchies that they have.

8 Q. Okay. Let's go over those three ways one at a
9 time.

10 MR. POLLINGER: If we go to the third
11 presentation, Mr. Diaz, Slide 1, please.

12 Q. (By Mr. Pollinger) Let's go over use of
13 pricing sequences made before May 6, 2010. Here on the
14 screen is an example hierarchical access sequence from
15 the 2009 presentation on infringement. It was created
16 before the 2010 patch. Can this be run with the
17 modified products after May 2010?

18 A. Yes. If this was already set, this can be run
19 after 2010.

20 Q. Who set this particular access sequence up?

21 A. This was set up by one of Versata's experts in
22 the previous determination.

23 Q. Trilogy's experts?

24 A. Oh, sorry, yes, Trilogy's experts.

25 Q. The names are interchangeable for here. Can

1 you describe what -- what's set up here?

2 A. Yes. We see the important three
3 characteristics of Mr. Carter's invention from a set up
4 standpoint over here. These fields with the 6,000, one
5 and two, represent the KNVH type customer hierarchy,
6 we'll talk more about that later. These down here
7 group -- main groups represent the product hierarchy,
8 and these A's next to each of those represent that they
9 will be used by the hierarchical access infringing
10 computer instructions.

11 Q. Can customers continue to use all hierarchical
12 access sequences created before the May 2010 patch?

13 A. Yes, sir. Any sequence created before the May
14 2010 patch works exactly the same way.

15 Q. This particular one here created for the 2009
16 presentation can continue to be used?

17 A. Absolutely, yes.

18 Q. What is shown here on SAP's document, Exhibit
19 PX1812?

20 A. Well, this document is SAP's instructions to
21 their customers about what this patch does and does not
22 do. And we see that SAP says existing access sequences
23 of the type hierarchical access created before the
24 installation of this note will continue to function as
25 before. This is what I was talking about by SAP making

1 sure that all their current customers who use this could
2 keep using it.

3 Q. So, for example, any SAP customers who set up
4 hierarchical accesses with that one type, that KNVH type
5 hierarchy before the patch is installed, can they
6 continue to use those after the patch?

7 A. Yes, sir, that's what this says. I've also
8 validated that on our test systems.

9 Q. Can those customers modify any KNVH customer
10 hierarchy specified for use with existing hierarchical
11 access sequences?

12 A. Sure. The customers can keep arranging the
13 hierarchy as much as they would like. They can make new
14 pricing changes, change discounts, change list prices,
15 change all the pricing information. None of that has
16 been affected.

17 Q. Okay. So you covered the first way, allowing
18 continued use of what was created prior to the patch.
19 Now, let's -- let's look at the second way you
20 mentioned, the -- the other editing tools?

21 MR. POLLINGER: If we could please go to
22 slide -- just go back one. Slide 1 here.

23 Q. (By Mr. Pollinger) This example sequence again
24 from the 2009 presentation that specified the KNVH-type
25 hierarchy, could this be newly created using only SAP's

1 editing tool after the patch?

2 A. No, sir. This could not be newly created using
3 just SAP's editing tools.

4 Q. You couldn't get the A in there with just SAP's
5 editing tool?

6 A. Well, to be very specific, SAP's editing tool,
7 you could type this A in there, but you could not save
8 it. And so if you couldn't save it, you couldn't create
9 a new one.

10 Q. Were the three claims, 26, 8, and 9, were they
11 read on this editing tool to establish infringement?

12 A. No, sir. None of the computer instructions
13 were -- from this editing tool were used with Claims 26,
14 28, and 29.

15 Q. In SAP's modified products after the patch, if
16 I wanted to create this same sequence here from 2009
17 from scratch or create other new hierarchical access
18 sequences specifying that one specific type, KNVH-type
19 hierarchy, is there a way to get that A in there?

20 A. Yes, sir, there is.

21 Q. And -- and how would that be done?

22 A. It's actually quite simple. You could use this
23 same SAP editing tool and not put in these three A's and
24 then save those to the SAP database. And then using a
25 variety of off-the-shelf database tools which all

1 customers have, you can type in these three A's.

2 Once you've done that, you can then view
3 this entire screen in the SAP tool and, in fact, run the
4 hierarchical accesses against the customer hierarchy and
5 the product hierarchy.

6 Q. Well, when you mention the off-the-shelf
7 editing tool, are you accusing the off-the-shelf editing
8 tool of -- of meeting a part of one of these three
9 claims?

10 A. No, sir, I'm not. The editing tools were
11 not -- the claims were not read on the editing tools.

12 Q. And after you get the A -- if you -- if you get
13 the A in there with this off the shelf editing tool,
14 after that is done, would the sequence when run in SAP's
15 modified products, would it use the hierarchical access
16 engine?

17 A. Yes, sir, it was. I -- yes, sir, it would.
18 I've also validated that on the test system by actually
19 making that change with the A myself.

20 Q. Okay. That's the second way of continued use
21 with -- with -- in conjunction with another
22 off-the-shelf editing tool.

23 Let's go to the third way, the last way
24 that you've mentioned to us. You mentioned that new
25 hierarchical access sequences can be created to use

1 other customer hierarchy types even after the 2010
2 patch?

3 A. Yes, sir, that's correct.

4 Q. What do you call those other customer
5 hierarchies in your expert report?

6 A. In my expert report, I refer to those as
7 alternate hierarchies of organizational groups.

8 Q. Creating those other customer hierarchies for
9 use in a hierarchical access sequence, can that be done
10 with SAP's editing tools alone without an off-the-shelf
11 editing tool?

12 A. Yes, sir, it can. It -- they're standard SAP
13 screens to do that.

14 Q. When you create these other customer
15 hierarchies, would they use the same customer records as
16 shown in the 2009 presentation?

17 A. Yes, they would use the same customer records.

18 Q. This slide here from the 2009 presentation
19 shows the Court's definition of purchasing organization
20 in the claims. Do customers entered in the customer
21 master file meet this definition?

22 A. Yes, customers in the customer master file meet
23 this definition for purchasing organization.

24 Q. And these customers in the customer master
25 file, the same ones that were pointed to in 2009?

1 A. Yes, in the very same ones.

2 Q. Is a purchasing organization basically a
3 customer?

4 A. Yes, it's basically a customer.

5 Q. This slide here from the 2009 presentation
6 shows the Court's definition of organizational groups.
7 Can the customers enter the customer master file be set
8 to be part of organizational groups?

9 A. Yes, sir, they can. Consistent with the
10 Court's construction and definition, these customers in
11 the customer master file are members of -- of
12 organizational groups.

13 Q. Have you prepared some slides for us to
14 illustrate this?

15 A. Yeah. Now would be a good time to see some of
16 those.

17 Q. What is shown on this slide here?

18 A. We'll see this screen a few times, so let me
19 explain it. This is the SAP change customer screen,
20 it's the XD02 SAP transaction, but we're actually
21 setting up information about a customer. We see
22 highlighted over here where this customer has
23 information being said about its geography, it's in the
24 U.S., it's in Texas, it is in Austin. This is very same
25 information that will be used to group all of the

1 customers in the U.S. or all the customers in Texas or
2 all the customers in Austin for the purposes of pricing.

3 Q. What do we see here?

4 A. We see another example of the same change
5 customer screen, this time what we're setting on the
6 customer is information about how it buys; from which
7 sales organization, from which distribution channel,
8 from which division. Likewise, the pricing will lump
9 all of the customers who buy from the same sales
10 organizational group from that sales organization group.

11 Q. And what's here?

12 A. Again, more fields off the same customer change
13 customer screen. In fact, SAP has other fields called
14 things like customer groups and price groups and clearly
15 these are used to group customers into things that are
16 customer groups and price groups.

17 MR. POLLINGER: Go to Slide 11, please.

18 Q. (By Mr. Pollinger) What do we see in this
19 slide from PX1811?

20 A. This is actually a small excerpt from a much,
21 much bigger document. SAP has tens and even over a
22 hundred fields on the customer information and each of
23 these can be used to group a group of customers that
24 share a characteristic. For example, five of those
25 fields are called customer group one, customer group

1 two, customer group three, four, and five, and none of
2 these are related to the KNVH type hierarchy which SAP
3 has tried to disable.

4 MR. POLLINGER: Go to Slide 11, please --
5 excuse me, Slide 8.

6 Q. (By Mr. Pollinger) This slide here from the
7 2009 presentation shows Claim 26 with the customer
8 hierarchy part highlighted, the arranging a customer
9 hierarchy part. Can these examples of other types of
10 customer groups that you've just described be arranged
11 hierarchically?

12 A. Yes, sir. I've prepared some slides on that as
13 well.

14 Q. What do you show here?

15 A. I show a geographic arrangement of these groups
16 in a hierarchical fashion. I want to remind everyone
17 that the Court's construction for the term hierarchy is
18 a branching arrangement of two or more levels of data.
19 So I'd like you to keep that definition in mind when we
20 go through these slides.

21 We see here the group that is the U.S. and
22 below that we see the first branch, which is Texas which
23 is within the U.S. and a second branch, which is
24 California, which is also within the United States.
25 Underneath California we see yet another branch which is

1 the U.S., California, and then city code 002 I believe
2 is San Francisco and city code 0 -- 0023 would be Los
3 Angeles. Don't quote me on this, I might not get my
4 codes right.

5 But in any case, what we do see is
6 consistent with the Court's definition, a branching
7 arrangement of two or more levels of data, each of these
8 present organizational groups. All the customers in the
9 U.S.; all the customers in Texas; all the customers in
10 California.

11 Q. So the hierarchy is by country, state, and
12 city?

13 A. In this example, it is, yes.

14 Q. What do you show here?

15 A. This is the same kind of view on the left-hand
16 side, but instead of using the organization -- sorry --
17 instead of using the geographic groups, we're using the
18 sales area groups, the sales organization, the
19 distribution channel I'm buying from a division. We see
20 the same kind of layout and branching arrangement on the
21 left that we saw earlier and SAP for this particular
22 type of information also shows that arrangement visually
23 and we see very specifically a branching arrangement
24 with two or more levels of these organizational groups.

25 Q. Can this be done for other customer groups?

1 A. Yes, sir. This can be done for any of the
2 fields that we were looking at in the SAP customer
3 master. So when we saw customer groups one, two, three,
4 four, five, I can show you hierarchies of those as well.
5 I didn't think it was worth using our time with that.

6 MR. POLLINGER: If we go to Slide 4,
7 please, Mr. Diaz.

8 Q. (By Mr. Pollinger) Here again is -- in this
9 slide is -- here again is this slide showing the
10 arranging the customer hierarchy part of Claim 26 along
11 with the Court's definitions. Are these other customer
12 hierarchies examples, are they hierarchies of
13 organizational groups as specified in this part of the
14 claim applying the Court's definitions?

15 A. Yes, sir. I've tried to be clear with that
16 with the pictures, but they do meet both of these
17 constructions.

18 Q. Did you apply the Court's constructions in all
19 of your infringement analysis?

20 A. Yes, sir, I'm required to and I did.

21 Q. Do SAP's modified products have the computer
22 instructions to set up these other customer hierarchies
23 that you described to us?

24 A. Yes, sir, they do.

25 Q. Based on your analysis, are these other

1 examples unusual?

2 A. No, sir, these are very common.

3 Q. If these other customer hierarchies are used,
4 would this arranging part of Claim 26 still be met?

5 A. Yes, sir, it would be met.

6 MR. POLLINGER: Let's go to Slide 12,
7 please.

8 Q. (By Mr. Pollinger) Let's look at all the parts
9 of Claim 26. Would the first two parts, the customer
10 media part, be met if these other types of customer
11 hierarchies are used?

12 A. Yes, sir, there's no change.

13 Q. Computer instructions called for are still
14 there?

15 A. All the computer instructions are still there,
16 they're still on the DVD, they're still downloaded,
17 they're still used with an SAP span across.

18 Q. Okay. In that second part, the customer
19 hierarchy part, we just went over that with you, so --
20 so that would still be met?

21 A. Yes, sir, it would.

22 Q. The next part, the product hierarchy part, if
23 these other customer hierarchies are used, would that
24 part be met?

25 A. Yes, sir, there's no change there.

1 Q. Would the storing part, would that be met?

2 A. Yes, sir, it would.

3 Q. Do you have some slides on that?

4 A. I -- I do.

5 Q. Is -- is this here, the storing example from
6 the 2009 infringement presentation, using that one
7 specific type of -- of customer hierarchy KNVH?

8 A. Yes. For the Jury who has probably never seen
9 this screen before, this is what was shown before to
10 show that SAP stores pricing information in something
11 called conditional records.

12 On the left, and it's customer hierarchy
13 section, this is the one type of customer hierarchy that
14 SAP has tried to effect the KNVH type customer
15 hierarchy.

16 Q. And if it's set up before 2010, it could still
17 be used after 2010, right?

18 A. That's correct. In fact, after 2010 you could
19 still add more information here if you wanted to as
20 well.

21 Q. What do you show on this next slide?

22 A. I show the very same screen that was used in
23 the previous determination, using the same types of
24 condition records, but this time we're showing them
25 arranged to be a -- a customer hierarchy. This

1 information stored via customer hierarchy of --

2 Q. I'm sorry?

3 A. -- of Geographic -- a geographic customer
4 hierarchy.

5 Q. And this next slide?

6 A. Same screen, same types of condition records,
7 this time using the sales area customer hierarchy.

8 Q. Can this storing with these other customer
9 hierarchy types, can this be done with customer -- other
10 customer group hierarchies?

11 A. Yes. Any of the fields on the customer master
12 can be used to group all customers sharing those
13 characteristics and pricing information is set on this
14 screen and stored for all of those other types of
15 customer hierarchies.

16 Q. Can SAP's own editing tool in its modified
17 products be used to set these other customer hierarchy
18 types to use the infringing hierarchical access software
19 engine?

20 A. Yes, sir.

21 Q. Do you have some slides on that?

22 A. Yes, I do.

23 MR. POLLINGER: Go to Slide 17, please.

24 Q. (By Mr. Pollinger) What do you show here?

25 A. Yeah, we've talked about screens like this

1 before. We show the geographic customer hierarchy with
2 the little A's next to it, meaning that it will be
3 considered hierarchically and this is possible in the
4 modified software.

5 Q. And how do those A's -- with the modified
6 software with these other customer hierarchy types, how
7 do you get the A's in there?

8 A. In this example, I type the A into this screen
9 and save it from this screen, which is a SAP screen.

10 Q. It's strictly using SAP's editing tool?

11 A. Yes, sir.

12 Q. What do you show on this next slide here?

13 A. It's the same type of example, but this time
14 using an example of a sales area customer hierarchy.
15 You get the A's. You can type the A's. You can save
16 the A's, and all this happens via SAP's own tool.

17 Q. No off-the-shelf editing tool?

18 A. No, sir.

19 Q. Can this be done for other customer groups as
20 well?

21 A. This can be done for any hierarchy of customer
22 groups you want to create other than the KNVH-type
23 customer hierarchy using this tool and this tool only.

24 MR. POLLINGER: If we could, Mr. Diaz,
25 please go to Slide 12.

1 Q. (By Mr. Pollinger) The remaining parts of Claim
2 26 here, the retrieve, sort, eliminate, determine, apply
3 parts, would these other parts of Claim 26 be met if any
4 of those other types of customer hierarchies are used?

5 A. All of these would be met if any of those were
6 used with hierarchical access.

7 MR. POLLINGER: Go to Slide 20, please.

8 Q. (By Mr. Pollinger) Is this here the example
9 from the 2009 presentation showing running the
10 infringing hierarchical access engine with the KNVH-type
11 customer hierarchy?

12 A. Yes, sir, it is. I believe the jury has seen
13 something like this. The access is hierarchical. The
14 type of hierarchy in this one is the KNVH-type, and it
15 executes the four types of steps required by the patent:
16 Retrieve, sort, eliminate, and apply.

17 Q. And then what do you show here on this next
18 slide?

19 A. This is that same screen but for the geographic
20 hierarchy, hierarchical access, same four steps.

21 Q. And what do you show here?

22 A. Same thing but for the sales area hierarchy
23 over here, the hierarchical access, same four steps.

24 Q. And if we were to use one of the other customer
25 group hierarchies, would the hierarchical access engine

1 go in the same manner in the modified products?

2 A. Yes, sir, it would. It does this for all the
3 types of customer hierarchies, including the KNVH
4 customer hierarchy. None of this has been affected.

5 Q. With these examples that you've given us, is
6 the hierarchical access engine put to use in the manner
7 set forth in the three claims of the '350 patent?

8 A. Yes, sir, it is.

9 Q. Okay. We've gone through all the parts of
10 Claim 26 now with those other types of customer
11 hierarchies. If these other types are used, is Claim 29
12 still infringed -- excuse me -- Claim 26 still
13 infringed?

14 A. I got confused by the question, Mr. Pollinger.
15 Would you mind repeating it?

16 Q. Yeah. With respect to what you've shown us on
17 these other customer hierarchies, if they are used, is
18 Claim 26 infringed?

19 A. Yes. We've looked at each of the claim
20 limitations of Claim 26. Each of them continues to be
21 met by using another type of customer hierarchy example.
22 And so, yes, Claim 26 is infringed.

23 MR. POLLINGER: If we could go to Slide
24 91, please.

25 Q. (By Mr. Pollinger) Let's look at the next

1 claim, Claim 28. If these other types of customer
2 hierarchies are --

3 MR. POLLINGER: It's the presentation one,
4 please.

5 Q. (By Mr. Pollinger) If these other types of
6 customer hierarchies are used, would Claim 28 be met?

7 A. Yes, sir, it would. All of the computer
8 instructions required for Claim 28 are still there, and
9 they meet each of the limitations of Claim 28, the
10 retrieving from a purchasing organization hierarchy, the
11 retrieving from a product hierarchy, and the receiving
12 and determining of a price. It's met in the same manner
13 it was in 2009.

14 Q. Let's compare Claim 28 and Claim 26, which we
15 just went over. Here are the first two parts of Claim
16 28 and 26. How do they compare?

17 A. They're the same.

18 Q. So they're met in the same way?

19 A. Yes, sir. They're met in the exact same way as
20 Claim 26.

21 Q. Here on the left side are the two retrieve
22 parts of Claim 28. How do they compare to the retrieve
23 part of Claim 26 on the right?

24 A. They're very similar. Claim 28 separates the
25 retrieval into two limitations. Claim 26 puts customer

1 and product hierarchy into one limitation or paragraph.
2 Claim 26 actually requires a few more things to happen.

3 Q. Here on the left is the last part of Claim 28,
4 the receiving part. How does it compare to the last
5 part of Claim 26?

6 A. They are very similar.

7 Q. What infringes Claim 28?

8 A. The hierarchical -- sorry.

9 The computer instructions capable of
10 implementing the hierarchical access execution engine
11 infringes Claim 26 -- 28. Sorry.

12 Q. Has that been changed in the modified products
13 in 2010?

14 A. No, sir. And I don't believe SAP contends that
15 it does.

16 Q. Is Claim 28 met if these other customer
17 hierarchy types that you described to us are used?

18 A. Yes, sir.

19 Q. The same manner as Claim 26?

20 A. Yes, sir, in the same manner.

21 MR. POLLINGER: Let's go to presentation
22 three, please, Slide 25, and let's look at the last
23 claim, Claim 29.

24 Q. (By Mr. Pollinger) Let's look at Claim 29
25 beside Claim 28.

1 A. Okay.

2 Q. Would Claim 29 be met if these other types of
3 customer hierarchies are used?

4 A. Yes, sir, it would.

5 Q. Could you explain that to us?

6 A. Yes, sir. There's, I guess, two important
7 parts of Claim 29.

8 The top part is a little bit different
9 than that of Claim 28. That requires a computer
10 processor, memory, and those computer instructions we've
11 been talking about in the memory. This happens when --

12 THE WITNESS: Sorry. Thank you.

13 A. This happens --

14 Q. (By Mr. Pollinger) This is the first four parts
15 here?

16 A. Yes. This is the first four parts.

17 This is what happens when SAP delivers
18 those computer instructions or downloads those computer
19 instructions on to a computer at one of their customers.
20 It has a processor, a memory, and the computer
21 instructions are installed.

22 Q. And what about the bottom three parts of Claim
23 29 as compared to the bottom three parts of Claim 28?

24 A. Well, the bottom three parts of Claim 29 are
25 the same as the bottom three parts of Claim 28. And so

1 Claim 29's bottom three parts are met in exactly the
2 same manner they'd be met for Claim 28 and also
3 Claim 26.

4 Q. So if the other customer hierarchy types that
5 you described to us, if they are used, is Claim 29
6 infringed?

7 A. Yes, sir, it is. Actually, it's not their
8 used; it's if the computer instructions are capable of
9 implementing them. But yes.

10 Q. It's the shipping and downloading of the
11 computer instructions for doing that?

12 A. Yes, sir.

13 Q. Do the three claims require a particular data
14 setup?

15 A. No, sir, they do not.

16 Q. Do they claim a data setup?

17 A. No, sir.

18 Q. Okay. But even under SAP's argument, would the
19 ability to create these other hierarchies with SAP's own
20 tools satisfy the claims?

21 A. Yes, sir, it would.

22 Q. So do these three checked-off poster boards
23 here from the 2009 determination, do they apply if these
24 other types of customer hierarchies are used?

25 A. Yes, sir. Each of these three claims is

1 infringed by the computer instructions that use the
2 other types of customer hierarchies.

3 Q. Okay. We've covered the ways customers can
4 continue to use the infringing software after the patch
5 is installed in 2010. Let's -- let's wrap up your
6 discussion now.

7 A. Okay.

8 Q. In 2009, it was determined -- let's wrap up
9 your infringement analysis.

10 In 2009, it was determined that SAP
11 directly infringes these three claims of the '350 patent
12 and also that SAP indirectly infringes Claim 29 of the
13 patent by way of inducement and contributory
14 infringement. Has that changed from May 6, 2010, going
15 forward with SAP's modified products?

16 A. No, sir.

17 MR. POLLINGER: If we go to the first
18 presentation, Slide 2.

19 Q. (By Mr. Pollinger) Are all three claims still
20 directly infringed as determined in 2009?

21 A. Yes, sir, they are.

22 Q. Is Claim 29 still indirectly infringed as
23 determined in 2009?

24 A. Yes, sir.

25 Q. By inducement?

1 A. Yes, sir.

2 Q. By contributory infringement?

3 A. Yes, sir. There have been no changes with
4 respect to that.

5 Q. Even if a 2010 patch is deemed to have changed
6 something from the 2009 determination, are the three
7 claims still directly infringed?

8 A. Yes, sir, in a variety of manners.

9 Q. Is Claim 29 still also indirectly infringed?

10 A. Yes, sir. There have been no changes there.

11 Q. Is SAP still literally infringing the claims?

12 A. Yes, sir.

13 Q. Is this true for all the accused products here,
14 all the modified products?

15 A. Yes, sir.

16 Q. What do you base this on?

17 A. I base this on a variety of evidence, including
18 SAP's technical information regarding their patch. I
19 base it on reading the source code for the patch. I
20 base it on installing that patch on to SAP systems after
21 May 2010 and using those systems.

22 Q. Do you base it upon the 2009 determination?

23 A. Yes, sir. I also used the 2009 determination
24 and the evidence therein.

25 I also based part of my opinion on the

1 deposition of Dr. Wolfgang Nieswand, which occurred in
2 London in March, where he confirmed my findings.

3 Q. Did you also base it on your independent
4 assessment?

5 A. Yes, sir, I did.

6 Q. To wrap up, what you have shown us on the
7 damages and the infringement issues, could you just tell
8 us very briefly what you have shown us on the damages
9 and the infringement issues, the two issues that you've
10 given opinions on?

11 A. Yes. I've shown that on the -- on the damages
12 and demand side, that Mr. Carter's invention does drive
13 a majority of the demand for the Pricer product and
14 there remains and continues to be a demand in the
15 marketplace for that invention.

16 On the infringement side, I've shown that
17 SAP's products, after May 2010, continue to infringe the
18 Carter patents.

19 Q. Thank you.

20 MR. POLLINGER: Your Honor, I pass the
21 witness.

22 THE COURT: All right. Cross-examination.

23 MR. BATCHELDER: Thank you, Your Honor.

24 May we first approach?

25 THE COURT: Yes.

1 MR. BATCHELDER: Thank you.

2 (Bench conference.)

3 MR. BATCHELDER: There's a -- there are
4 couple of things.

5 There was a Motion in Limine about the
6 '400 patent, vis-à-vis the '350 patent, and we would
7 renew our request to be able to introduce into evidence
8 that the '400 patent was part of the last determination,
9 and it was determined not to be infringed.

10 THE COURT: I'm going to stick with my
11 prior ruling on that.

12 MR. BATCHELDER: Okay.

13 THE COURT: Sustaining the objection to
14 that line of questioning.

15 MR. BATCHELDER: Okay. And then we would
16 like to make an offer of proof. And we can do it now or
17 at lunch, whatever Your Honor's preference is, about the
18 need to isolate the value of the '350 patent as compared
19 to the '400. You ruled against us on that.

20 THE COURT: I did, and we'll -- we can do
21 that at the lunch break.

22 MR. BATCHELDER: Thank you, sir.

23 THE COURT: They've got one to make as
24 well.

25 MR. BATCHELDER: Yes. Thank you.

1 THE COURT: Do you have an expert report
2 or something you want to make as your offer?

3 MR. BATCHELDER: I'm sorry?

4 THE COURT: You want to tender your
5 expert --

6 MR. BATCHELDER: We can do that, yes.

7 THE COURT: Well, however you want to do
8 is fine with me.

9 MR. BATCHELDER: All right.

10 THE COURT: I'd rather not take a bunch of
11 testimony.

12 MR. BATCHELDER: Thank you. No. I
13 understand.

14 THE COURT: You can do it in a summary
15 fashion, okay?

16 MR. BATCHELDER: Yes, sir. Thank you.

17 THE COURT: All right.

18 (Bench conference concluded.)

19 CROSS-EXAMINATION

20 BY MR. BATCHELDER:

21 Q. Mr. Gupta, good morning.

22 A. Good afternoon.

23 Q. Almost afternoon.

24 A. Oh, morning. I was close. I was getting
25 hungry.

1 Q. I'm there with you.

2 You are here today to render expert
3 testimony, right?

4 A. Yes, sir.

5 Q. Objective, impartial expert testimony?

6 A. Yes, sir. That's what I've done.

7 Q. Okay. One thing, I'm sure you understand, the
8 ladies and gentlemen of the jury will want to consider
9 for all the experts who will testify in this case,
10 because more will come, is whether a given expert may
11 have a certain connection to one party, Trilogy, or
12 another party, SAP, that might make it hard for them to
13 be impartial.

14 Do you think that would be a fair thing
15 for them to think about?

16 A. That would be fair.

17 Q. Okay. So you're being paid for your work in
18 this case, but that's true for all the experts, correct?

19 A. Yes, sir, I believe so.

20 Q. All right. But you do have connections to
21 Trilogy and Versata that no experts on the SAP side has
22 to either party in the case; is that fair?

23 A. Yes, sir. I worked at Trilogy for 13 years, as
24 I've explained.

25 Q. Right. So you were employed at Trilogy. You

1 started in 1995; is that right?

2 A. Yes.

3 Q. Okay. And you had several positions there over
4 your 13-year tenure, correct?

5 A. Yes, sir.

6 Q. One of them was, you were managing director of
7 Trilogy's intellectual property; is that correct?

8 A. Yes.

9 Q. Intellectual property includes patents.

10 A. Yes, sir. I have a fair bit of experience in
11 patents.

12 Q. Yes. And you had that position starting in
13 2007?

14 A. Yes, I believe so.

15 Q. Through 2009 when you left, right?

16 A. Yes.

17 Q. Okay. So this lawsuit was filed in 2007,
18 correct?

19 A. Yes, sir, it was.

20 Q. Okay. So for around a couple of years while
21 this lawsuit was pending, you were working as an
22 employee of Trilogy in connection with managing
23 intellectual property when this patent lawsuit existed;
24 is that fair?

25 A. Yes.

1 Q. Okay. You mentioned, I believe, in your --
2 early on in your direct testimony that you got a
3 graduate degree from Harvard, correct?

4 A. No, sir.

5 Q. I'm sorry?

6 A. No, sir.

7 Q. Did I misunderstand? You have some kind of
8 graduate degree; is that right?

9 A. It was the Executive Education Program. My
10 graduate degree is from MIT in computer science.

11 Q. Okay. So that -- that Harvard degree, can you
12 say again what it was?

13 A. It's the Executive Education Program.

14 Q. Okay. And that -- that -- you got a degree
15 there; is that correct?

16 A. No, sir. I don't think I have a degree.

17 Q. Okay. But you went to school for some period
18 of time at Harvard?

19 A. Yes, sir.

20 Q. Okay. And that was paid for by Trilogy,
21 correct?

22 A. Yes, sir. That was in 2000, I believe.

23 Q. Okay. Now, all of the SAP experts, you've read
24 their reports, correct?

25 A. I've skimmed some of them. I've read some of

1 them.

2 Q. Okay. And you know that they got postgraduate
3 degrees in educational pursuits and certificates,
4 et cetera, but none of those were paid for by SAP; is
5 that fair?

6 A. I don't know who paid for their degrees, sir.

7 Q. Okay. But as far as you know, they're not?

8 A. I have no basis but now.

9 Q. Okay. All right. It's also fair to say that
10 many of the Trilogy and Versata current and former
11 employees that are directly involved in this suit, you
12 count them as your personal friends; is that fair?

13 A. Yes, sir.

14 Q. Okay. So the first witness from Versata
15 yesterday was Tom Carter, right?

16 A. Yes, it was.

17 Q. And the named inventor on the patent that we're
18 here to talk about that you just said has been infringed
19 in a variety of ways by modified software, right?

20 A. That's correct.

21 Q. And you consider him to be a close personal
22 friend of yours.

23 A. Yes, I do.

24 Q. Okay. The next witness for Trilogy and Versata
25 was Sameer Dholakia. Do you remember that?

1 A. Yes, I do.

2 Q. Okay. He also is someone who you consider to
3 be a close personal friend, correct?

4 A. Yes, sir.

5 Q. Okay. The third witness we heard this morning,
6 Mr. Smith, from Trilogy/Versata, also a close personal
7 friend of yours, correct?

8 A. Yes, he's a friend.

9 Q. Joe Liemandt. We've heard a lot about him, as
10 Mr. Melsheimer described him, the big boss at Trilogy.
11 Close personal friend of yours, correct?

12 A. He's also a friend, yes.

13 Q. Randall Jacobs, who has been sitting in the
14 courtroom, CEO of Versata, also a personal friend of
15 yours, correct?

16 A. Yes. I've work with these people for many,
17 many years and developed friendships.

18 Q. And you don't have any personal friends at SAP,
19 right?

20 A. None that I'm aware of, sir.

21 Q. Okay. Now, since you left the employment of
22 Trilogy/Versata -- and it was June 2009; is that right?

23 A. Yes.

24 Q. You mentioned, I believe, on direct that you
25 worked as a consultant in connection with these kinds of

1 lawsuits; is that fair?

2 A. Yes, sir.

3 Q. Okay. And you've worked on seven of them,
4 seven lawsuits, right?

5 A. I've worked on more than seven lawsuits, sir.

6 Q. As a consultant, you've worked on seven cases
7 since you left Versata?

8 A. Yes, that's correct.

9 Q. Okay. And in those seven cases, six of those
10 seven, you were working with the McKool Smith law firm,
11 Versata's lawyers in this case, right?

12 A. Yes, sir, I was.

13 Q. And the seventh one, you were working for
14 Versata, right, an entity owned by Versata?

15 A. Yes.

16 Q. Okay. So in a hundred percent of those seven
17 lawsuits that you've worked on since leaving
18 Trilogy/Versata, you've worked either with a law firm or
19 with the company itself, right?

20 A. Yes. Your math is right.

21 Q. Okay. All right. Let's talk a little bit
22 about your experience as an expert, could we?

23 You've never been designated by a court as
24 an expert, have you?

25 A. No, sir, I have not.

1 Q. And you've never testified as an expert before
2 at trial, correct?

3 A. That's correct.

4 Q. Now, you rendered some opinions about this
5 modified software and whether you think it infringes.
6 Tomorrow SAP's independent expert, Dr. Ray Mercer, is
7 going to speak to those. So we're not going to spend
8 too much time today on all that, but I do want to ask
9 you some questions to get some clarity so Dr. Mercer
10 understands what it is you're saying, okay?

11 A. Okay.

12 Q. All right. And I want to see if we can't start
13 off by agreeing on some things.

14 MR. BATCHELDER: Mr. Barnes, would you
15 please put up the cover sheet of the '350 patent?

16 All right. And if you could just blow up
17 this section here (indicates).

18 Q. (By Mr. Batchelder) Okay. So, first of all, I
19 just want to be clear about something. There was a
20 related application that was filed in 1996, correct?

21 A. Yes.

22 Q. And that application matured into a different
23 patent, not the one we're talking about here, correct?

24 A. Yes, sir.

25 Q. Okay. No damages being sought for that patent,

1 correct?

2 A. No, sir.

3 Q. All right. The application here was filed in
4 1999, correct?

5 A. Yes.

6 Q. And the three claims that you were talking
7 about and rendering opinions about in connection with
8 this modified software, 26, 28, and 29, and the other
9 claims of the '350 patent, those were submitted to the
10 Patent Office the first time either on February 19th,
11 1999, or later; is that right?

12 A. Yes, that's right.

13 Q. Okay. Now, the application, once it was filed,
14 do you understand, would have been kept secret, right?
15 It wasn't published, correct?

16 A. That's -- that's my understanding, yes.

17 Q. Okay. And you're not saying that SAP would
18 have known about that application in '96, '97, '98, and
19 '99, right?

20 A. I've seen no evidence that they have.

21 Q. Okay. And there's no claim in this case that
22 any infringement by SAP has been willful in any way,
23 correct?

24 A. I don't believe there has been.

25 Q. Okay. And you realize that kind of claim can

1 be made but hasn't been made here; is that right?

2 A. Yes, sir.

3 Q. Okay. And Versata hasn't made that claim as to
4 the software that existed before of May of last year or
5 after, right? The modified software, no claim of
6 willfulness, right?

7 A. I'm sorry. I didn't follow the question.
8 Could you repeat it?

9 Q. There was no claim by Versata and is no claim
10 in this case that any SAP infringement has been willful,
11 either before May of 2010 or in connection with his
12 accusations of infringement as to the modified software?

13 MR. POLLINGER: Can we approach the bench,
14 please, Your Honor?

15 THE COURT: Yes.

16 (Bench conference.)

17 MR. POLLINGER: Your Honor, this was
18 referred to already in opening by Mr. Melsheimer, and
19 now it's been repeatedly referred to by Mr. Batchelder.

20 I'd ask that the jury be instructed that
21 they should not draw an inference based upon what claims
22 were not asserted in this case. They're trying to
23 indicate the unfairly prejudicial impression it's
24 because we chose not to allege willful infringement in
25 this case.

1 THE COURT: I'm going to overrule that
2 objection.

3 MR. POLLINGER: Thank you, Your Honor.

4 (Bench conference concluded.)

5 Q. (By Mr. Batchelder) So we've been talking about
6 willfulness. I was just asking you about there's no
7 claim of willful infringement either before the
8 modification or after, and that's correct, right?

9 A. I'm not aware of any.

10 Q. Okay. And willful infringement would mean
11 intentional or deliberate, right?

12 A. Yes, sir.

13 Q. There's no claim of that here.

14 A. Again, not that I'm aware of.

15 Q. Okay. All right. And there's no claim that
16 SAP took Trilogy software code, correct?

17 A. That's correct.

18 Q. No claim that it took its trade secrets or
19 confidential business information, correct?

20 A. None that I've seen.

21 Q. Okay. All right. Let's see if we can't agree
22 on a few more things.

23 We've talked about -- you've talked about
24 hierarchical access. You've talked about customer
25 hierarchies. You've talked about product hierarchies.

1 Hierarchical access alone, first of all, it can be used
2 for things other than pricing, correct?

3 A. Yes, sir, it can.

4 Q. It can be used to draw data from even data
5 structures that aren't hierarchies, right?

6 A. Yes, sir, it can.

7 Q. Customer hierarchies can be used outside of
8 pricing, right?

9 A. Yes, sir.

10 Q. So can product hierarchies?

11 A. Yes, sir.

12 Q. Hierarchy access alone doesn't infringe any of
13 these claims, right?

14 A. No, sir.

15 Q. Customer hierarchies alone don't infringe any
16 of these claims, correct?

17 A. That's correct.

18 Q. Same with product hierarchies, correct?

19 A. That's right.

20 Q. Combining hierarchical access with a product
21 hierarchy alone would not infringe, right?

22 A. That's correct.

23 Q. And same with combining hierarchical access
24 with a customer hierarchy. Would not infringe, correct?

25 A. Well, all of these questions, as long as the

1 computer instructions were there to do both, they would,
2 but if you're asking about those computer instructions
3 that could just do what you're saying, then no.

4 Q. That's what I'm asking. The answer is no,
5 correct?

6 A. That's correct.

7 Q. All right. And one of the reasons you were
8 saying that SAP's modified software, that is, the
9 modifications you were talking about that took place in
10 May 2010, you say they infringe is because there is code
11 that could run on pre-existing access sequences; that
12 is, access sequences that could have existed before May
13 2010 and that would run hierarchical access on both
14 product hierarchy and a customer hierarchy and that data
15 would then be used to determine a given price, right?

16 A. I was saying the computer instructions that are
17 capable of running on that data setup would be
18 infringing, yes.

19 Q. Okay. And true or false. Other than access
20 sequences created by Versata's experts in this lawsuit,
21 you've never seen that data setup; you've never seen an
22 example of it, correct?

23 A. I've seen evidence of one.

24 Q. You've never seen a customer actually having
25 set that kind of thing up, correct? True or false?

1 A. False.

2 Q. True or false. You don't know any specific
3 name of a customer that has, in fact, used any of the
4 accused SAP products to generate a given price using
5 data derived from both the running of a hierarchical
6 access on a product hierarchy and the running of a
7 hierarchical access on an organizational hierarchy?

8 A. False.

9 MR. BATCHELDER: Mr. Barnes, could we
10 please -- could we please put up the sworn testimony of
11 Mr. Gupta on March 23rd starting at Page 62 running
12 through Lines 3 through 9?

13 Q. (By Mr. Batchelder) QUESTION: Can you name a
14 customer who has used any of the accused SAP products to
15 generate a given price using data derived from both the
16 running of the hierarchical access on product hierarchy
17 and the running of a hierarchical access on an
18 organizational hierarchy.

19 ANSWER: I don't know any specific name of
20 a customer that, in fact, has done those things.

21 Right?

22 A. That's what I said then, yes.

23 Q. Okay. You have no opinion as to whether it is
24 any more or less likely that customers would set up and
25 use hierarchical access only for a product hierarchy but

1 not for a customer hierarchy, correct?

2 A. That's correct.

3 Q. Okay.

4 MR. BATCHELDER: Your Honor, I'm about to
5 move into a new topic that's going to take a bit to
6 navigate. I'm wondering if this might be a convenient
7 time.

8 THE COURT: Well, let's do seven minutes
9 of it.

10 MR. BATCHELDER: Okay. Thank you.

11 Q. (By Mr. Batchelder) You talked about some
12 questions that Versata sent to 40 of SAP's customers,
13 correct?

14 A. Yes, sir.

15 Q. All right. And you understand that Versata did
16 not ask if the customers were calculating a given price
17 by running hierarchical access on both customer
18 hierarchy and a product hierarchy, correct?

19 A. No, sir. I can't agree with that.

20 Q. Okay. So you think that is what was asked?

21 A. It was asked sometimes, yes.

22 Q. Is it fair to say that Versata asked about
23 using product hierarchies without regard to whether they
24 were used for pricing?

25 A. Sometimes that was asked, yes.

1 Q. And it asked about customer hierarchies without
2 regard to whether they were used for pricing, correct?

3 A. Yes, that was asked.

4 Q. And it asked about hierarchical access without
5 asking whether it was being run on customer hierarchies
6 or product hierarchies, correct?

7 A. I can't agree with that. That was asked
8 sometimes.

9 Q. To whom was that asked?

10 A. That was asked to IBM specifically, is one that
11 I recall.

12 Q. Anybody else?

13 A. Not that I recall.

14 Q. Okay. So the other 39, that wasn't asked,
15 correct?

16 A. I don't know affirmatively. I -- in studying
17 for the testimony today, we reviewed the 14 that I had
18 called out previously. Of those 14, that was at least
19 asked to IBM. I don't recall what happened in the other
20 26.

21 Q. And assuming that that question was not asked
22 to those other 39, you don't know why, right?

23 A. No, sir, I was not involved with that.

24 Q. All right.

25 MR. BATCHELDER: Why don't we put up, if

1 you would, Mr. Barnes, PX1708. These are the questions
2 that were asked to Chevron.

3 And if we could go to Page 20 to Question
4 44.

5 Q. (By Mr. Batchelder) All right. So here's one
6 of the questions you were talking about.

7 44: For each U.S. version of SAP's ERP
8 software, has the SAP ERP software ever been used to
9 group any of the company's products into a product
10 hierarchy?

11 Do you see that?

12 A. Yes, sir.

13 Q. And there's no mention of pricing there, is
14 there?

15 A. No, sir, there's not.

16 Q. Doesn't say: Have you done this in connection
17 with pricing or for purposes of pricing or anything like
18 that, right?

19 A. No, sir.

20 Q. It just says: Have you grouped these things --
21 products into product hierarchies, right?

22 A. Yes.

23 Q. And they answered yes, okay?

24 MR. BATCHELDER: And then could we go down
25 a little bit, Mr. Barnes, to the next question, No. 45?

1 Q. (By Mr. Batchelder) 45: For each U.S. version
2 of SAP's ERP software, has the SAP ERP software ever
3 been used to group any of the company's customers into a
4 customer hierarchy?

5 And, again, nothing about pricing in that
6 question, is there?

7 A. No, sir.

8 Q. It just asks: Did you take customers and did
9 you put them into hierarchies, right?

10 A. Well, specifically -- well, generally, yes.

11 Q. Yeah. Okay.

12 And you can answer yes to that even if
13 you're doing it for some reason other than pricing,
14 correct?

15 A. Yes, you could.

16 Q. Okay. And you have a yes answer, right?

17 A. Chevron said yes.

18 Q. Uh-huh.

19 MR. BATCHELDER: And could we turn then,
20 Mr. Barnes, a few questions later to Question 48.

21 Okay. It's right here (indicates). Thank
22 you.

23 Q. (By Mr. Batchelder) So No. 48: For each U.S.
24 version of SAP's ERP software, has the company ever used
25 hierarchical access to perform pricing?

1 Answer: Yes.

2 You see that?

3 A. Yes.

4 Q. Okay. Now, here they do ask about pricing, but
5 what they don't ask is whether hierarchical accesses
6 were used to generate a given price by running on both a
7 customer hierarchy and a product hierarchy, right?

8 A. Yeah. In this question, yeah.

9 Q. Okay. And, again, you don't know why?

10 A. No. I was not involved with it, sir.

11 Q. Okay. And we've seen three yes answers to
12 these questions, and I believe you said before that when
13 someone answers yes to all three of these, either that
14 it follows logically or that you think it's
15 overwhelmingly likely this means they must use
16 hierarchical access to generate a price by running it on
17 both a customer hierarchy and a product hierarchy, even
18 though that question was never asked.

19 A. I believe that it is likely.

20 Q. Uh-huh.

21 Now, Chevron answered these questions yes.
22 We know that they don't generate a given price by
23 running hierarchical access on a product hierarchy and a
24 customer hierarchy, correct?

25 A. Yes. And, in fact, that's why I said likely.

1 I'm not suggesting that it's a hundred percent for sure.

2 Q. Okay. And for Chevron, we know the answer, and
3 we know the answer is they don't do it, right?

4 A. Yes, sir.

5 Q. And they told us that in a sworn affidavit,
6 correct?

7 A. Yes. I've read that affidavit.

8 MR. BATCHELDER: Would you please put up,
9 Mr. Barnes, 2772.

10 To the next page, please.

11 Q. (By Mr. Batchelder) So here's the Chevron
12 affidavit.

13 MR. BATCHELDER: Could you please blow up
14 these few paragraphs?

15 Q. (By Mr. Batchelder) And the Chevron affiant
16 says: I've investigated. Chevron's SAP systems are not
17 configured to reach hierarchical accesses to retrieve
18 condition records from a customer hierarchy. Chevron's
19 SAP systems are not configured to compute a price based
20 on pricing information retrieved via hierarchical
21 accesses from a customer hierarchy.

22 Chevron's SAP systems are not considered
23 to compute a price based on pricing information
24 retrieved via hierarchical accesses from both a customer
25 hierarchy and a product hierarchy, correct?

1 A. Yes. I've had a chance to study these.
2 They're talking about one specific type of customer
3 hierarchy, not all types of customer hierarchies. So I
4 don't know if you can draw the full conclusion from
5 this.

6	Q.	Uh-huh.
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7 THE COURT: Mr. Batchelder, we'll break
8 here for lunch.

9 | MR. BATCHELDER: Thank you, Your Honor.

10 THE COURT: Ladies and Gentlemen, take
11 until 1:15, an hour and 15 minutes, for lunch, and
12 remember my prior instructions, and don't talk about the
13 case.

14 | LAW CLERK: All rise for the jury.

15 | (Jury out.)

16 THE COURT: You may step down.

17 | Y'all be seated.

18 | You can step down.

19 THE WITNESS: Oh, thank you, sir.

20 THE COURT: You have an offer to make with
21 respect to the --

22 MS. FITZGERALD: Yes. Versata has an
23 offer of proof to make.

24 THE COURT: -- royalty.

25 MS. FITZGERALD: Mr. Callahan is going to

1 handle that.

2 THE COURT: Okay. Mr. Callahan, come on.

3 MR. BAXTER: Could we be excused, Your
4 Honor?

5 THE COURT: Yes, absolutely.

6 MR. MELSHEIMER: May we be excused as
7 well, Your Honor?

8 THE COURT: Yes.

9 MR. CALLAHAN: May it please the Court.

10 Steve Callahan on behalf of Versata. And
11 Versata respectfully makes this offer of proof pursuant
12 to Federal Rule of Evidence 103(a)(2).

13 First, I'll start with the offer of proof
14 with respect to Mr. Weinstein's opinions. If permitted
15 by the Court to do so, Mr. Weinstein would testify as
16 follows: Based upon his review of the expert report of
17 Neeraj Gupta, he identified 21 Trilogy licenses for
18 which Pricer was either the primary reason for the
19 license or priced separately.

20 These licenses provided a benchmark for
21 calculating the value of Pricer in isolation, and they
22 will be referred to as the Pricer isolated agreements.

23 Based on actual licensed agreements, he
24 determined that Trilogy license revenue associated with
25 Tier 1 -- and when I refer to Tier 1, I generally refer

1 to Fortune 500 or Global 2000 companies -- associated
2 with Tier 1, Pricer-isolated Trilogy customers has
3 averaged \$1.8 million per customer.

4 He also determined that Trilogy license
5 revenue for Pricer isolated agreements involving Tier 2
6 customers -- and when I refer to Tier 2 customers, I
7 refer to smaller general market customers -- has
8 averaged \$530,000 per customer.

9 Now, in order to determine -- excuse me --
10 to determine the value of the patented invention for
11 Tier 1 customers, Mr. Weinstein relied on Mr. Gupta's
12 calculation that no less than 63 percent of the value of
13 the Pricer product is attributable to the
14 patent-in-suit, that is, the '350 patent.

15 Now, multiplying average Trilogy license
16 revenue for Pricer-isolated Tier 1 customers of 1.8
17 million times the 63 percent figure associated with
18 Mr. Gupta, yields average revenue attributable to the
19 patent-in-suit of \$1.1 million.

20 Now, based on the testimony of the
21 inventor, that is, Mr. Carter, and Mr. Gupta,
22 Mr. Weinstein would testify that he concluded that there
23 was -- minimal effort would be required by SAP to
24 incorporate the invention into its product offerings.

25 Also, SAP's responses to Interrogatory 42,

1 that's Versata Interrogatory 42, indicates that
2 developing hierarchical access involved only 20 to 40
3 developer days for each of R/3 and CRM, thus indicating
4 a de minimus cost.

5 Nonetheless, Mr. Weinstein conservatively
6 adjusted the value of the Pricer product, and that's 1.1
7 million, by 10 percent to account for the difference
8 between a product license and a patent license.

9 Accordingly, he estimated that the value
10 of the '350 patent on a standalone basis is
11 approximately \$1 million. This figure represents the
12 value of the patent based on actual real-world
13 transactions.

14 SAP, to our knowledge, does not challenge
15 this adjustment. According to the supplemental expert
16 report of Chris Bakewell, average SAP revenue for Tier 1
17 customers between April 22nd, 2003, and April 30th,
18 2011, is \$3.3 million.

19 Mr. Weinstein would testify that
20 Mr. Bakewell adjusted this figure upward to \$3.99
21 million per customer to account for the change in SAP
22 average yield size for Tier 1 customers between the late
23 1990s and the 2003 and 2011 timeframe.

24 Accordingly, the value of the
25 patent-in-suit is equivalent to 26 percent of revenue;

1 i.e. 1 million divided by the 3.99-million-dollar
2 figure.

3 Now, SAP license revenue has averaged \$541
4 per seat for Tier 1 customers. Accordingly, according
5 to Mr. Weinstein or what he would testify to, the value
6 of the patent-in-suit is approximately \$140 on a
7 per-seat basis, and that equals 26 percent of \$541.

8 The figure of \$140 per seat represents the
9 value created by the patent. This figure is based on
10 Trilogy's actual license agreements that embody the
11 patent-in-suit and Mr. Gupta's analysis of the specific
12 contribution of the patent-in-suit to license revenues
13 associated with those agreements.

14 Accordingly, \$140 represents value created
15 by the patent-in-suit in the form of a patent license.

16 Now, Mr. Weinstein will also testify as to
17 the economics of bilateral monopoly and the Nash
18 Bargaining Solution. He testified that the Nash
19 Bargaining Solution is a well-accepted principle of
20 economic theory, and it would be -- excuse me --
21 applicable to the hypothetical negotiation between the
22 parties over the distribution of this value. And the
23 parties, of course, would be Trilogy and SAP.

24 Based on these concepts, and specifically
25 the Nash Bargaining Solution, Mr. Weinstein has

1 determined that the most likely outcome of the
2 hypothetical negotiation would involve a 50/50 split of
3 the benefits; i.e., the reasonable royalty for Tier 1
4 customers is \$70.

5 Consistent with the Nash Bargaining
6 Solution, this leaves both Trilogy and SAP better off
7 than they would have been without reaching a deal to
8 license the '350 patent.

9 Using a similar analysis, Mr. Weinstein
10 has determined that the reasonable royalty for Tier 2
11 customers would be \$20. This reflects a 50/50 split of
12 the benefit per SAP seat of \$40 for Tier 2 customers.

13 This benefit \$40 was calculated as the
14 ratio of average Trilogy license revenue per customer
15 for Pricer-isolated agreements involving Tier 2
16 customers, 510,000, to average Trilogy license revenue
17 per customer for Tier 1 customers of \$1.8 million, and
18 that's 28 percent of \$70.

19 Additionally, if allowed to do so,
20 Mr. Weinstein would testify as to what he examined with
21 respect to a 2006 settlement agreement between Versata
22 and Selectica in which Versata licensed the '350 patent
23 and several additional patents.

24 In return, Selectica gave Versata a
25 cross-license and also paid Versata \$7.5 million under

1 the agreement. This license payment amounts to
2 estimated 10.5 percent of licensed revenue.

3 Since SAP sells the infringing software in
4 a bundled fashion, Mr. Weinstein examined the evidence
5 to identify a base within SAP's software comparable to
6 the base of the Selectica pricing software that was
7 accused of infringement and then licensed.

8 Mr. Weinstein found evidence that in the
9 1999 SAP -- excuse me -- that in 1999, SAP considered
10 offering SPE as a standalone pricing product for
11 approximately \$1,000 per seat. Applying the 10.5
12 percent rate calculated under the Selectica agreement to
13 the standalone price contemplated by SAP yields a
14 royalty of \$105 per seat.

15 Mr. Weinstein's reasonable royalty damages
16 are calculated by multiplying the number of SAP Tier 1
17 seats, 2.5 million, containing the infringing software
18 times the Tier 1 reasonable royalty rate of \$70. This
19 yields a reasonable royalty damages of approximately 175
20 million for infringement associated with Tier 1 SAP
21 seats.

22 Reasonable royalty damages for Tier 2
23 seats containing the infringing software, 2.5 million --
24 that's 2.5 million seats -- are approximately \$50
25 million. 2.5 million seats times a reasonable royalty

1 rate of \$20 per seat, total reasonable royalties,
2 assuming no lost profits are awarded, would equal
3 approximately \$225 million.

4 The calculations would be the same if lost
5 profits are awarded, except that SAP seats for which
6 lost profits are awarded, would be subtracted from the
7 royalty base before calculating reasonable royalties.

8 That concludes the Weinstein offer of
9 proof. I will now proceed with the Bakewell offer of
10 proof.

11 THE COURT: You want to just do it by
12 giving me his expert reports?

13 MR. CALLAHAN: Oh, as long as SAP agrees
14 that that's sufficient to preserve the record, I'd love
15 to do that, Your Honor, and I think that would save
16 everybody a lot of time.

17 MR. BATCHELDER: I would delight in that,
18 Your Honor.

19 THE COURT: Well, that's -- so would I.

20 MR. CALLAHAN: Apologies.

21 THE COURT: I mean, you're doing a fine
22 job summarizing his expert report, but --

23 MR. CALLAHAN: Yes. We were just under
24 the assumption that this would be one way to do it, but
25 I will -- I can give you the -- all of the expert

1 reports, as well as the Selectica agreement that I
2 referenced.

3 THE COURT: Why don't you gather those
4 up --

5 MR. CALLAHAN: Yes, sir.

6 THE COURT: -- over the lunch hour, and
7 I'll receive them as Court's 1 collectively with the
8 exhibits that you intended to use with the experts
9 related to reasonable royalty.

10 MR. CALLAHAN: Yes, sir.

11 THE COURT: That will be received as
12 Court's 1 and be your offer of proof --

13 MR. CALLAHAN: Excellent.

14 THE COURT: -- on the royalty issue, okay?

15 MR. CALLAHAN: I appreciate that, Your
16 Honor.

17 THE COURT: Appreciate it.

18 Mr. Batchelder, you have one as well?

19 MR. BATCHELDER: Yes, Your Honor. Thank
20 you. I can, I think, do this just by referencing the
21 expert report.

22 The expert report of --

23 THE COURT: Is that agreeable?

24 MR. CALLAHAN: Yes, Your Honor.

25 THE COURT: Okay. All right.

1 MR. BATCHELDER: Thank you.

2 The expert report of Dr. Ray Mercer is
3 already Defendants' Exhibit DX2725. And it states
4 opinions that are based on the fact that the '400 patent
5 has been determined by this Court not to be infringed,
6 and his point was that to properly value the '350
7 patent, you have to isolate the contribution of the '350
8 patent as compared to the '400 patent, and he asserts
9 opinions to that effect in his expert report, DX2725,
10 and we would both elicit testimony from Dr. Mercer on
11 that subject and also would have elicited --

12 THE COURT: Consistent with his expert
13 report.

14 MR. BATCHELDER: Yes, sir.

15 THE COURT: Okay.

16 MR. BATCHELDER: And we also would have
17 elicited cross-examination testimony from Mr. Gupta on
18 that subject had the Court allowed.

19 THE COURT: Okay. On the same -- the same
20 areas that Dr. Mercer had put in his expert report.

21 MR. BATCHELDER: Yes, sir.

22 THE COURT: Okay.

23 MR. BATCHELDER: Thank you.

24 THE COURT: All right. If you want to --
25 same thing and gather up his expert report, I'll receive

1 it as Court's 2.

2 MR. BATCHELDER: It's already a DX, Your
3 Honor.

4 THE COURT: Okay. Well, it will be
5 DX2725?

6 MR. BATCHELDER: That's it, sir.

7 THE COURT: Okay. Those portions that are
8 related to the finding of no infringement of the '400
9 patent will be -- you can just submit the exhibit
10 itself, and we'll label it Court's 2, okay?

11 MR. BATCHELDER: Thank you.

12 MR. POLLINGER: If I could just --
13 Mr. Batchelder, which expert report is that?

14 MR. BATCHELDER: This is the rebuttal
15 expert report of Dr. Ray Mercer.

16 MR. POLLINGER: It's not admitted into
17 evidence, though, is it?

18 MR. BATCHELDER: It is DX2725.

19 MR. POLLINGER: I mean, it's got an
20 exhibit sticker on it, but it's not been admitted into
21 evidence. It's hearsay.

22 MR. BATCHELDER: Okay. Well, we can make
23 it a Court exhibit then, Your Honor.

24 THE COURT: Okay. Y'all gave us a list
25 yesterday of what had been admitted, I thought, so...

1 LEGAL ASSISTANT: It's not admitted.

2 THE COURT: Okay. All right. Well --

3 MR. BATCHELDER: Thank you.

4 MR. POLLINGER: We're not --

5 THE COURT: It is hearsay. It's not
6 admitted, but it will be received as Court's 2.

7 MR. BATCHELDER: Thank you, Your Honor.

8 MR. POLLINGER: Thank you, Your Honor.

9 (Lunch recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
SHELLY HOLMES, CSR
Deputy Official Court Reporter
State of Texas No. 7804
Expiration Date: 12/31/12

May 10, 2011

/s/_____
GLENDA FULLER, CSR
Deputy Official Court Reporter
State of Texas No. 1042
Expiration Date: 12/31/12

May 10, 2011